113-433

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1457

FREDERICK PRENTICE, PLAINTIFF IN ERROR,

vs.

ORZORA P. STEARNS, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 29, 1884.

SUPREME COURT OF THE UNITED STATES.

No. ....

FREDERICK PRENTICE,

PLAINTIFF IN ERROR.

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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H. M. HALL, PRINT, MINNEAPOLIS.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Judges of the Circuit Court of the United States for the District of Minnesota,

GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between

FREDERICK PRENTICE, Plaintiff,

1 *vs.*

ORZORA P. STEARNS, Defendant,

a manifest error hath happened, to the great damage of the said plaintiff as is said; WE, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capital in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the 109th year.

[SEAL U. S. CIRCUIT COURT, DIST. OF MINN.]

OSCAR B. HILLIS,

2 *Clerk of the Circuit Court of the United States of America, for the District of Minnesota.*

UNITED STATES OF AMERICA,

District of Minnesota, ss.

The answer of the Judges of the Circuit Court of the United States for the District of Minnesota, in the Eighth Circuit, in within writ mentioned.

The record and proceedings where mention is within made, with all things concerning the same, are hereby respectfully certified to the Justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed marked "A" as within it is commanded.

3

[SEAL U. S. CIRCUIT COURT DISTRICT OF MINN.]

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the District of Minnesota, this 13th day of September, in the year of our Lord one thousand eight hundred and eighty-four and of the Independence of the United States the one hundredth and ninth year.

OSCAR B. HILLIS,

Clerk U. S. Circuit Court, Dist. of Minnesota.

UNITED STATES CIRCUIT COURT,

District of Minnesota.

Pleas before the Honorable, the Judges of the Circuit Court of the United States of America, at the June term of said Court, held
4 in the City of Saint Paul, in said District, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 108th year.

DISTRICT OF MINNESOTA, ss.

Be it remembered that on this 7th day of September, A. D. 1883, came the complainant above named by Rea, Kitchel and Shaw, his solicitors, and of counsel, and filed in the Clerk's office of said Court, his bill of complaint in the words and figures following, to-wit:

BILL OF COMPLAINT.

UNITED STATES OF AMERICA.

CIRCUIT COURT OF UNITED STATES,

District of Minnesota.

FREDERICK PRENTICE, Plaintiff,
vs.
ORZORA P. STEARNS, Defendant.

Plaintiff complaining of defendant alleges:

That the plaintiff is a resident and citizen of the State of Ohio, and that the defendant is a resident and a citizen of the State of Minnesota.

That the plaintiff is the owner in fee and entitled to the immediate possession of one undivided half (½) interest in the following described
5 real estate situate in the county of St. Louis, and State of Minnesota, viz.: Lot eighty-two (82) and the east half (E. ½) of lot eighty-four (84) in block two (2) in Duluth proper, 3d division, according to the recorded plat thereof on file in the office of the Register of Deeds of St. Louis county, State of Minnesota.

That the defendant is in possession thereof and wrongfully and unlawfully withholds the same from plaintiff, and has enjoyed the same, withholding all the rents, issues, profits, benefits and advantages growing out of the use and control of said premises from this plaintiff to his damage in the sum of ten thousand dollars ($10,000.00).

That the plaintiff has hitherto demanded possession thereof of the defendant, and possession thereof has been refused.

Wherefore the plaintiff demands judgment,

1. For the possession of the said premises.

2. For ten thousand dollars ($10,000.00), the plaintiff's damages as aforesaid, together with the costs and disbursements of this action.

REA, KITCHEL & SHAW,
Plaintiff's Attorneys.
No. 239 Nicollet Ave.,
Minneapolis, Minn.

6 C. K. DAVIS,
BENJAMIN A. WILLIS,
of Counsel.

(Complaint duly verified.)

And on the same day, pursuant to said complaint, summons was duly issued out of said Court, under the seal thereof duly tested in the words and figures following, to-wit:

SUMMONS AND MARSHAL'S RETURN THEREON.

UNITED STATES OF AMERICA.

DISTRICT OF MINNESOTA,—ss.

In the Circuit Court of the United States for the District of Minnesota:

FREDERICK PRENTICE,
against
ORZORA P. STEARNS. } Summons.

The President of the United States of America, To the Defendant above named, Greeting:

You are hereby summoned and required to answer the complaint in this action which has been filed in the office of the Clerk of this Court, in Saint Paul, County of Ramsey, and State of Minnesota, and file your answer in said Clerk's office within twenty days after the service hereof, excluding the day of said service, and if you fail to answer the
7 complaint as aforesaid the plaintiff will apply to the Court for the relief demanded together with the costs and disbursements of this action. For the marshal of the District of Minnesota to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, [U. S. CIRCUIT COURT SEAL.] in said District of Minnesota, this 7th day of September, in the year of our Lord, one thousand eight hundred and eighty-three, and of our independence, one hundred and eighth year.

OSCAR B. HILLIS,
Clerk.

REA, KITCHEL & SHAW,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify that I have served the annexed summons on the herein named defendant Orzora P. Stearns personally, by handing to and leaving with him a true copy thereof at Duluth in said District, on the 20th day of September, 1883.

H. R. DENNY,
U. S. Marshal.
By W. S. WILSON,
Deputy.

8

Marshal's fees Ex. $11.50.
Filed Sept. 21, 1883.

OSCAR B. HILLIS,
Clerk.

And afterwards, to-wit: on the 7th day of November, A. D. 1883, comes the defendant, per-se and files in the Clerk's office of our said Court his answer to the bill of complaint in the words and figures following:

ANSWER.

UNITED STATES OF AMERICA.

CIRCUIT COURT OF THE UNITED STATES,

For the District of Minnesota.

FREDERICK PRENTICE, Plaintiff,
vs.
ORZORA P. STEARNS, Defendant.

1st. The defendant for answer to the complaint of the plaintiff herein denies each and every allegation therein contained not hereinafter admitted to be true.

2d. The defendant admits that the plaintiff is a citizen and resi-
9 dent of the state of Ohio and that the defendant is a citizen of the state of Minnesota, and in possession of the lands described in the complaint.

3d. The defendant specially denies that the plaintiff is or was at the time of the commencement of this action the owner or entitled to the possession of any interest whatever in the real estate mentioned and described in the complaint or any part of it and denies that the plaintiff has suffered damage in any sum whatever by reason of any or all the facts and pretended facts alleged in the complaint.

4th. The defendant further answering says that ever since August, A. D. 1875, he has been the undisputed owner of an undivided one-half of the lands described in the complaint, that said lands always remained vacant and unoccupied till the year A. D. 1880, that in the year A. D. 1880, under color of title to the whole of said lands for which he paid a valuable consideration and in good faith the defendant peacefully took possession of said lands and caused to be erected thereon a hotel and livery barn of the aggregate value of four thousand dollars, and defendant and those under whom he so claims have paid all taxes assessed against said lands since the year A. D. 1868, amounting in the aggregate as defendant is informed and believes to be more than five hundred dollars.

Wherefore the defendant demands judgment against the plaintiff that he take nothing by this action and for his costs and disburse-
10 ments herein, or if the plaintiff recover the lands in controversy that the defendant recover from the plaintiff one-half the value of said improvements and one-half the taxes so paid as aforesaid with interest.

ORZORA P. STEARNS,
Attorney in Person.

JOHN M. GILMAN, AND
GORDON E. COLE,
of Counsel.

STATE OF MINNESOTA,

County of St. Louis, ss:

Orzora P. Stearns came before me personally and being duly sworn doth say that he is defendant in the above entitled action, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes it to be true.

ORZORA P. STEARNS.

Subscribed and sworn to before me this 6th day of November, A. D. 1883.

C. E. BOSTWIK,

11 [NOTARIAL SEAL.] *Notary Public*,

St. Louis Co., Minn.

And afterwards, to-wit: on the 28th day of November, A. D. 1883, the following reply to the answer of defendants was filed in the words and figures following, to-wit:

REPLY.

UNITED STATES OF AMERICA,

CIRCUIT COURT OF THE UNITED STATES,

For the District of Minnesota.

FREDERICK PRENTICE, Plaintiff,
vs.
ORZORA P. STEARNS, Defendant.

For a reply to defendants answer herein, plaintiff alleges that he has no knowledge or information sufficient to form a belief as to the value of the alleged buildings and improvements made by said defendant on said land and therefore denies that the same are of the value of four thousand dollars, ($4,000.00) or of any value whatsoever.

Further replying, plaintiff alleges that he has not knowledge or information sufficient to form a belief as to whether said defendant has paid any taxes on said lands and if so, the amount thereof, and therefore plaintiff denies that said defendant has paid taxes on said land of the sum of over five hundred dollars, ($500.00) or any other sum whatsoever for the taxes on said land.

12 Further replying, plaintiff denies each and every allegation of new matter or counter claim in said answer contained and each and every part thereof.

Wherefore plaintiff prays that defendant may recover nothing, but that plaintiff may have judgment as prayed for in his complaint.

REA, KITCHEL & SHAW,
Attorneys for Plaintiff,
239 Nicollet Ave.,
Minneapolis, Minn.

C. K. DAVIS AND
BENJ. A. WILLIS,
of Counsel.

STATE OF MINNESOTA,
County of Hennepin, ss:

John P. Rea came before me personally, and being duly sworn, doth say that he is one of plaintiffs' attorneys in the above entitled action; that the foregoing pleading is true to the best of his knowledge, information and belief, and that the reason why this affidavit of verification is not made by said plaintiff, is that he is absent from the State of Minnesota, wherein resides this affiant, his said attorney, and further saith not.

JOHN P. REA.

13 Subscribed and sworn to before me, on this 27th day of November, A. D. 1883.

[SEAL.]

FRANK W. SHAW,
Notary Public, Minn.

And afterwards, to-wit: on the 20th day of June, A. D. 1884, the following stipulation waiving jury was filed in the words and figures following, to-wit:

STIPULATION WAIVING JURY.

CIRCUIT COURT OF THE UNITED STATES,
District of Minnesota.

FREDERICK PRENTICE,
vs.
ORZORA P. STEARNS.

It is hereby stipulated that a jury in the above entitled action is hereby waived, and that all of the issues of law and fact therein be tried by the court without a jury.

This stipulation is to extend to the second trial if one is demanded by either party under the statute, and all of the trials of said action.

It is stipulated that the question of title shall be first tried and determined, and that thereafter the issue of damages and mense profits shall be tried by the court or referee if the court shall so order.

14 Dated June 17, 1884.

REA, KITCHEL & SHAW,
Plaintiff's Attorneys.

CASH & ENSIGN,
W. W. BILLSON,
J. M. GILMAN & GORDON E. COLE,
Defendant's Attorneys.

And afterwards, to-wit: on the 24th day of June, A. D. 1884, the following further proceedings were had and entered of record in said cause in T. M. E. page 389, in the words and figures following:

FREDERICK PRENTICE, *vs.* ORZORA P. STEARNS. } Present Hon. Samuel F. Miller, Circuit Justice. David J. Brewer, Circuit Judge. R. R. Nelson, District Judge.

A jury having been waived herein by the parties and said cause regularly coming on for trial the parties appeared by their respective attorneys. Thereupon this cause is heard upon the pleadings, proofs and arguments of counsel and the trial of the same not being concluded at the hour of adjournment, it is ordered that further proceedings herein be postponed until to-morrow morning at 10 o'clock.

And afterwards, to-wit: on the 25th day of June, A. D. 1884, the following further proceedings were had and entered of record in said
15 cause, in T. M. "F" page 391 in the words and figures following:

FREDERICK PRENTICE, *vs.* ORZORA P. STEARNS. } Present, Hon. Samuel F. Miller. " David J. Brewer. " R. R. Nelson, Judges.

The trial of this case coming on for further hearing, the same is further argued by the attorneys for the respective parties, duly submitted and by the court taken under advisement.

And afterwards, to-wit: on the 30th day of June, A. D. 1884, the fol-

lowing further proceedings were had and entered of record in said cause in T. M. "F" page 406, in the words and figures following:

FREDERICK PRENTICE, vs. ORZORA P. STEARNS. } Present, Hon. Sam'l. F. Miller, " David J. Brewer, " R. R. Nelson, Judges.

This cause having been heretofore heard by the court, upon the pleadings, final proofs and the arguments of the respective attorneys and by the court taken under advisement. Now the court after due consideration thereof, and being fully advised in the premises, announces its opinion. Pursuant thereto it is ordered that a judgment in favor of defendant dismissing the bill of complaint be entered herein.

And afterwards, to-wit: on the fifth day of August, A. D. 1884, the following judgment of dismissal was entered in said cause in the
16 words and figures following:

LAW REGISTER.

UNITED STATES CIRCUIT COURT,

District of Minnesota.

FREDERICK PRENTICE, vs. ORZORA P. STEARNS. } August 5, 1884.

The court having heretofore ordered a judgment in this cause in favor of the defendant dismissing the bill of complaint herein, now, on motion of J. M. Gilman, attorney for defendant, it is ordered that the bill of complaint herein be and the same is hereby dismissed, and that the defendant have and recover of and from the plaintiff his costs taxed at one hundred ($100) dollars and that he have execution therefor.

Judgment signed this 5th day of August, A. D. 1884.

OSCAR B. HILLIS,
Clerk.

17

And on the 10th day of August, A. D. 1884, the following finding of facts and conclusions of law, duly signed by the Honorable Samuel F. Miller and R. R. Nelson, Judges, together with the exhibits therein referred to and attached threto, were ordered filed and made of record in this cause, to-wit:

UNITED STATES OF AMERICA,

UNITED STATES CIRCUIT COURT,

For the District of Minnesota.

FREDERICK PRENTICE, Plaintiff,
vs.
ORZORA P. STEARNS, Defendant.

This action having been brought to trial before the court, without a jury, the court finds the following facts:

1. That the treaty made and concluded on the 30th day of September, A. D. 1854, between the United States and the Chippewa Indians, of Lake Superior, and the Mississippi, whereby said Indians ceded to the United States certain territory lying adjacent to the head waters of Lake Superior, contained the following provision, viz: "And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that Chief Buffalo may select one section of land at such place in the ceded territory as he may see fit, which shall be reserved for that purpose and conveyed by the United States to such person or persons as he may direct."

2. That said treaty was ratified pursuant to a resolution of the United States Senate passed on the 10th day of January, 1855, by the President of the United States on the 29th day of January, 1855.

18 3. That the said Chief Buffalo, pursuant to said provision of said treaty, and on the day of the date thereof, to-wit, September 30th, 1854, by an instrument of writing, executed by him and filed in the office of the United States Commissioner of Indian affairs at Washington, D. C., selected the land to be conveyed thereunder by the United States, and appointed the persons to whom it was to be conveyed, as follows, viz.: After reciting the foregoing provision of said treaty, "I hereby select a tract of land one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis Bay, Minnesota Territory, immediately above and adjoining Minnesota Point, and I direct that patents be issued for the same according to the above recited provision to Shaw-Braw-Skung, or Benjamin Armstrong, my adopted son, to Matthew May-Dway-Gwon, my nephew, to Joseph May-Dway-Gwon and Antoine May-Dway-Gwon, his sons, one quarter section to each." That the land Buffalo had in view and intended in such designation is not included, nor any part thereof, in the patents subsequently issued by the United States to the relatives of said Buffalo named above, which patents are hereinafter referred to.

4. That said Matthew, Joseph and Antoine, under date of September 17, 1855, executed and delivered to said Armstrong, an instrument, assigning to him their right, title and interest under said appointment
19 and selection of Chief Buffalo, a copy of which instrument of assignment is hereto attached and marked exhibit "A."

5. That said Benjamin G. Armstrong and wife on September 11, 1856, made, executed, acknowledged and delivered to the plaintiff herein, a

deed of conveyance, a copy of which is hereto attached, marked exhibit "B," and made a part of these findings. That a large portion of the land embraced within the courses and distances of said deed is covered by water, and that portion which is not covered by water in said description is land which Chief Buffalo had in view and intended to embrace in his selection as aforesaid, but does not embrace the land involved in this suit.

6. That said deed from Armstrong to plaintiff was duly recorded in the County of St. Louis, territory of Minnesota, on the 4th day of November, A. D. 1856.

7. That the piece or parcel of land, the title to which is involved in this action, is situated in said County of St. Louis, territory (now State) of Minnesota.

8. That the said Benjamin G. Armstrong and wife, on the 27th day of August, 1872, executed and delivered to the plaintiff the confirmatory deed, a copy of which is hereto attached and marked exhibit "C," and made a part of these findings, which deed was duly recorded in the County of St. Louis, State of Minnesota, September 2, 1872.

20 9. That the tract of land which Chief Buffalo had designated as his selection on the day of the treaty did not correspond with the section lines when the land came to be surveyed into sections, and the United States land department decided that the Buffalo designation of the land was too indefinite to enable patents to be issued therefor, and furthermore the land thus designated by Buffalo, was found to be occupied by, and was thereby claimed by certain Indian traders under said treaty, and after a lengthy correspondence and investigation in respect thereto by the Interior and Indian Departments, the matter was finally adjusted by said relatives withdrawing their claim to the land so designated by Buffalo and consenting to accept other land in lieu thereof to be selected by the Indian Department; whereupon the Commissioner of Indian affairs by its agent, and by the direction of the said Interior Department, and with the approval of the President, and assent of the said relatives named as aforesaid by said Buffalo, selected certain other lands aggregating 682 acres and situated in four different government sections, as shown by diagram hereto attached and marked exhibit "D," and apportioned the same among said relatives. A copy of the report of the Secretary of the Interior to the President upon the final selection of said land is hereto attached, marked exhibit "E," and made a part of these findings. That on the 23d day of October, 1858, patents for the land so apportioned were
21 duly issued to them by the United States, one of which patents was issued to said Armstrong, and a copy of which is hereto attached and marked exhibit "F." That the land involved in this suit is a part of the land embraced in said patent to said Armstrong.

10. That the chief, Buffalo, died in the month of October, 1855, and before the land conveyed by the Government to his appointees under said provision of said treaty was finally selected, and without any action on his part under said provision of said treaty subsequent to the appointment of the persons to whom the land was to be conveyed and the conditional selection of the land on the 30th of September, 1854, as aforesaid.

11. That the United States Government surveys of the lands ceded by said treaty of September 30, 1854, to the United States had not been made at the date of the said deed from Armstrong to plaintiff, and were not made until the year following the date thereof.

12. That said Armstrong and wife by warranty deed duly executed and recorded, dated October 22, 1859, conveyed an undivided half of the lands conveyed to him and the other appointees of Chief Buffalo aforesaid, by the United States by said patent of October 23, 1858, to Daniel S. Cash and James H. Kelly.

13. That after said patents were issued to said appointees as aforesaid the said Matthew, Joseph and Antoine, on March 13, 1859, executed deeds of conveyance of the land which had been so patented to them respectively, to the said Armstrong; which deeds were duly recorded in said St. Louis County, May 17, 1859; and that the said Armstrong and wife on the 31st day of August, 1864, for a valuable consideration, executed and delivered their deed of conveyance of an undivided half of the land so patented to him, and the said Matthew, Joseph and Antoine, to John M. Gilman, which conveyance was duly recorded in said St. Louis County, September 12, 1864, a copy of which conveyance is hereto attached and marked exhibit "G." That said Gilman took said conveyance without any actual notice of said deed from said Armstrong to the plaintiff of September 11, 1856, or that plaintiff claimed an interest in the land so conveyed to him, said Gilman.

14. That the defendant herein claims title to the piece or parcel of land in controversy as a grantee of said Gilman and under and through said deed to said Gilman of August 31, 1864.

15. That the undivided one-half of the property described in the complaint herein is worth the sum of ten thousand dollars ($10,000).

And the following conclusions of law thereupon:

I. That the appointment of persons to whom the United States were to convey the section of land reserved by the said provision of said treaty, made by the said Chief Buffalo on the 30th day of September, 1854, was a valid and sufficient appointment under said provision, and upon the ratification of said treaty vested in the said Benjamin G. Armstrong and the other appointees named such an interest as the treaty gave to the land so reserved.

II. That the patent of the United States to Armstrong, and his acceptance of it is a valid execution of the treaty on that subject.

III. That the deed from said Armstrong to plaintiff of date of September 11, 1856, is in its execution, acknowledgement and recording a valid and sufficient deed and its record is constructive notice of its contents.

IV. That the description in the deed of said Armstrong to plaintiff of September 11, 1856, is insufficient to convey his interest in or title to any other or different tract of land to which he might have been entitled under said treaty than the specific tract described by metes and bounds therein, and that said deed is ineffectual as a conveyance to plaintiff of

any interest or title except such as said Armstrong had in or to the land therein particularly described, and that plaintiff thereunder took no title to the land for the possession of which this action is brought.

V. That the quit claim deed from said Armstrong to said John M. Gilman, of August 31, 1864, conveyed to the said Gilman such interest and no more as said Armstrong had in the land therein described at the date of said deed.

24 VI. That the plaintiff is not entitled to recover in this action, and judgment is ordered for the defendant for his costs and disbursements.

SAM. F. MILLER.

R. R. NELSON.

Exhibit A.

Whereas, it was provided in and by the 6th section of article two of the treaty concluded at Lapointe, between the United States by Henry C. Gilbert and David B. Heniman, Commissioners duly appointed for the purpose, and the Chippewa Indians, of Lake Superior, as follows:

"And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the Chief Buffalo may select one section of land in such place in the ceded territory as he may see fit, which shall be reserved for that purpose and conveyed by the United States to such person or persons as he may direct."

And whereas, the said Chief Buffalo, after the making and concluding of such treaty and on the 30th day of September, 1854, did by an instrument in writing, duly executed by him, select "a tract of land one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west side of St. Louis Bay, Minnesota Territory, immediately above and adjoining Minnesota Point," and did direct
25 that patents be issued for the same according to the above recited provision to Shaw-Bwaw-Skung, or Benjamin G. Armstrong, the adopted son of said Buffalo, to Matthew May-Dway-Gwon, the nephew of said Buffalo, to Joseph May-Dway-Gwon and Antoine May-Dway-Gwon, sons of the said Matthew, one quarter section to each.

Now, therefore, we, the said Matthew May-Dway-Gwon, Joseph May-Dway-Gwon and Antoine May-Dway-Gwon, in consideration of the premises and of one dollar to us in hand paid by the said Benjamin G. Armstrong, the receipt whereof is hereby acknowledged, we do hereby sell, assign, and transfer jointly and severally, all our right, title, interest, equity, claim and property in and to the said land, and all our right and equity in and to the said instrument so made by the said Buffalo jointly and severally and our and each of our right and equity to have patents issued to us according to the above recited directions of the said Buffalo, and we hereby direct jointly and severally that patents issue to said Benjamin G. Armstrong accordingly.

In witness whereof we have hereunto set our hands and affixed our seals the seventeenth day of September, A. D. 1855.

In presence of
H. C. GILBERT,
Ind. Agt.
JOHN F. GREGORY,
26 *U. S. Interpreter.*
H. L. STEVENS.

his
MATTHEW X MAY-DWAY-GWON,
mark.

his
JOSEPH X MAY-DWAY-GWON,
mark.

his
ANTOINE X MAY-DWAY-GWON.
mark.

STATE OF WISCONSIN,

Lapointe County, ss:

I certify that on this 22d day of September, in the year one thousand eight hundred and fifty-five, personally came before the undersigned, Henry C. Gilbert, agent, &c., Matthew May-Dway-Gwon, Joseph May-Dway-Gwon and Antoine May-Dway-Gwon, whose names are affixed to the above instrument, who are to me known to be the identical persons who executed the above instrument and being by me personally examined severally acknowledged that they fully knew and understood the contents, purposes, effect and meaning of the same and that they executed the same freely of their own accord, without fear or compulsion of any one.

And I further certify that such instrument was interpreted and explained to said Matthew, Joseph and Antoine by an official interpreter in the employment of the Government of the United States
27 before they executed and acknowledged the same.

HENRY C. GILBERT,
Indian Agent.

Exhibit B.

This indenture, made the eleventh day of September, in the year one thousand eight hundred and fifty six, between Benjamin G. Armstrong and Charlotte Armstrong, wife of sd. Benjamin G., of the County of Lapoint, State of Wisconsin, of the first part, and Frederick Prentiss, of Toledo, Ohio, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of eight thousand dollars, to us in hand paid by the said party of the second part, at or before the unsealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quit-claimed, and by these presents do remise, release and quit-claim, unto the said party of the second part, and

to his heirs and assigns forever, one undivided half of all the following described piece or parcel of land, situate in the County of St. Louis, and Territory of Minnesota, and known and described as follows, to-wit: Beginning at a large stone or rock at the head of St. Louis River Bay, nearly adjoining Minnesota Point, commencing at said rock and running east
one mile, north one mile, west one mile, south one mile to the
28 place of beginning, and being the land set off to the Indian Chief "Buffalo," at the Indian treaty of September 30, A. D. 1854, and was afterwards disposed of by said "Buffalo" to sd. Armstrong, and is now recorded with the Government documents, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; to have and to hold the aforesaid premises, with all the priviliges and appurtenances to the said premises, belonging or appertaining unto the said party of the second part, his heirs and assigns forever. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to, the above described premises, and every part and parcel thereof, with the appurtenances. And the said Armstrong and his wife, party of the first part, for themselves and their heirs, executors, and administrators, do covenant, promise, and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, that they have not made, done, committed, executed, or suffered any act or acts, thing or things, whatsoever, whereby, or by means whereof, the above described premises, or any part thereof, now are, or at any time hereafter, shall, or may be impeached, charged, or incumbered, in any manner or way whatsoever.
29 In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

B. G. ARMSTRONG, [SEAL.]

her
CHARLOTTE X ARMSTRONG. [SEAL.]
mark.

Sealed and delivered in presence of

EDWIN ELLIS,

ASAPH WHITTLESEY.

STATE OF WISCONSIN,

County of La Pointe, ss.

Be it known, that on the eleventh day of September, A. D. 1856, before the undersigned, personally came Benjamin G. Armstrong and his wife, Charlotte Armstrong, the grantors to the foregoing deed, from them as such grantors to Frederick Prentice, to me personally known to be the identical persons described in and who executed the said deed, and they ackdowledged that they executed the same deed, freely and voluntarily, for the uses and purposes therein expressed.

The written interlineation "some undivided half" was made before signing.

EDWIN ELLIS,
Justice of the Peace.

STATE OF WISCONSIN,
County of La Pointe,

I, S. S. Vaughn, Clerk of the Circuit Court, for the County and State
30 aforesaid, do hereby certify that Edwin Ellis, whose name is subscribed to the certified acknowledgment, and written thereon was at the time of taking such acknowledgment, an acting Justice of the Peace, duly elected, sworn duly authorized to take the same, and further, that I am well acquainted with the hand writing of such Edwin Ellis and verily believe the signature to the said acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at La Pointe, this 11th day of September, A. D. 1856.

[COURT SEAL.]

S. S. VAUGHN,
Clerk.

Exhibit C.

Whereas, on the eleventh day of September, in the year one thousand eight hundred and fifty-six, we, Benjamin G. Armstrong and Charlotte Armstrong, wife of aforesaid Benjamin G. Armstrong, conveyed by a quit claim deed to Frederick Prentice, of Toledo, Ohio, the undivided one-half part of all our interest in certain lands, situated at or near the head of St. Louis Bay, and intended to describe our interest in what is known as the Chief Buffalo tract at the head of St. Louis Bay, Minnesota Territory, and then believing that the description in said deed would cover, or was the tract that would be patented to us by the United States of Amer-
31 ica, according to said Buffalo's wishes, and a contract we held from the heirs of said Buffalo. But to definitely fix upon the lands designed to be conveyed, it was stated in said deed to be the land set off to the Indian Chief Buffalo, at the Indian treaty of September thirtieth, in the year one thousand eight hundred fifty-four. And further, I, the said Armstrong, gave a contract on the tenth day of September, in the year one thousand eight hundred and fifty-six, to the said Frederick Prentice; binding ourselves and heirs to give said Frederick Prentice any further writing or instrument he might require.

And on the first day of July in the year one thousand eight hundred and fifty-seven, I, Benjamin G. Armstrong and Charlotte Armstrong, agreed to, and did sell to Frederick Prentice, the other one-half of said Buffalo tract, for which said Frederick Prentice paid us something over

two thousand ($2,000) dollars, and since that time has paid us to our full satisfaction for the whole property. And we agreed to, and by these presents confess payment in full for the whole of the above tract, in compliance of the first deed for the one undivided half, and the carrying out of the contract to sell the balance July first in the year one thousand eight hundred and fifty-seven. This is intended to cover the land deeded by us to the said Prentice in the deed given on the eleventh day of September, eighteen hundred and fifty-six, and recorded in liber A
32 of deeds, page 106, at Duluth, State of Minnesota, and the land included in the contract of the first of July, eighteen hundred and fifty-seven, and intended to cover the lands as described in patents from the United States of America to Benjamin G. Armstrong, Matthew May-Dway-Gon, Joseph May-Dway-Gon and Antoine May-Dway-Gon, and described as follows; to Benjamin G. Armstrong, The west half of the south-west quarter, and the lot number five (5) of section twenty-seven; and lot No. three (3) of section thirty-four, containing together (182 62-100) one hundred and eight-two and sixty-two one hundredths acres. And to Joseph May-Dway-Gon the south-east quarter of section twenty-eight, containing one hundred and sixty acres. And Antoine May-Dway-Gon, the east half of the north-east quarter of section twenty-eight, and the west half of the north-west quarter of section twenty-seven, containing one hundred and sixty acres. And to Matthew May-Dway-Gon the south-west quarter of section twenty-two containing one hundred and sixty acres; all of the above being in town fifty, north of range fourteen, west of the fourth principal meridian, State of Minnesota, and the three last named pieces of land have since been deeded by the said Matthew, Joseph and Antoine May-Dway-Gon to Charlotte Armstrong. But previous to the date of said deeds, the above named Joseph, Matthew and Antoine May-Dway-Gon had assigned or transferred all their
33 right, title and interest therein to the said Benjamin Armstrong. I, the aforesaid Benjamin G. Armstrong, did sell by deed and contract to Frederick Prentice, which I, the said Charlotte Armstrong knew at the time, but did not know but that by getting another deed or conveyance after the patents were issued, we could sell the property, but am now satisfied that we had sold and assigned all our right, title and interest to Frederick Prentice previous to our deeding to any other person or persons, and that we had no right to deed or convey to any other person or persons, as the title to the lands above described was then virtually and by right vested in the said Frederick Prentice: and that the first deed for the one-half, and the contract for the remaining half of said land with the payment thereon made at the time by the said Frederick Prentice, bound us to give him good and sufficient deeds to said property whenever so demanded; and we do hereby assign and quit claim all our right, title and interest, now or at any time held by us to all the above described property, in fulfillment of our agreements with the said Frederick Prentice.

In witness whereof we have, this 27th day of August, in the year one thousand eight hundred and seventy-two, affixed our hands and seals.

B. G. ARMSTRONG, [SEAL.]
34 her
CHARLOTTE X ARMSTRONG, [SEAL.]
mark.

Signed, sealed and delivered in presence of

ASAPH WHITTLESY,

C. J. ALVORD,

N. W. GOODWIN.

STATE OF WISCONSIN,

County of Ashland, ss.

Be it known that on the 27th day of August, A. D. 1872, before the undersigned personally came Benjamin G. Armstrong and Charlotte Armstrong his wife, to me known to be the persons described in and who executed the foregoing instrument, and they acknowledge that they executed the same freely and voluntarily, for the uses and purposes therein expressed.

N. W. GOODWIN.

[SEAL.] *Notary Public.*

STATE OF WISCONSIN,

County of Ashland, ss.

I, Joseph Riel, Clerk of the Circuit Court of the County of Ashland, and state aforesaid, do hereby certify, that Nathan W. Goodwin,
35 before whom the foregoing instrument was taken, was at the time of taking such acknowledgement, a Notary Public, in and for said County, duly appointed and qualified and authorized to take the same; and further, that I am acquainted with the hand writing of the said Nathan W. Goodwin, and verily believe his signature to the above instrument to be genuine.

Given under my hand and the seal of the said Court, at La Pointe, this 28th day of August, A. D., 1872.

JOSEPH RIEL,

[SEAL.] *Clerk of the Circuit Court.*

Exhibit "D"

TOWNSHIP N° 50 N. RANGE N° 14 WEST 4th PRIN.L MER.N



Exhibit E.

DEPARTMENT OF THE INTERIOR,
September 21, 1858.

SIR.—The 6th section of the 2d article of the treaty concluded on the 30th of September, 1854, between the United States and the Chippewas, contained the following provision, viz: "And being desirous of providing for some of his connections who have rendered his people important services, it is agreed that the Chief Buffalo may select one section of land at such place in the ceded territory as he may see fit, which shall be reserved for that purpose and conveyed by the United States to such person or persons as he may direct."

39 The only restriction upon this right of selection is contained in the 10th article of the same treaty in these words: "All missionaries and teachers and other persons of full age, residing in the territory hereby ceded, or upon any of the reservations hereby made by authority of law, shall be allowed to enter the land occupied by them at the minimum price whenever the surveys shall be completed, to the amount of one quarter section each."

Under the clause of the treaty first above recited, the Chief Buffalo on the 30 Sept. 1854, the day upon which the treaty was signed, selected a tract of land one mile square, "lying on the west shore of St. Louis Bay, Minnesota Territory, immediately above and adjoining Minnesota Point," the exact boundaries of which were of course, to be defined when the surveys were made.

And by the same instrument he directed that patents should be issued to four relatives whom he named, for a quarter section each.

This selection by Buffalo, with a memorandum by Armstrong, one of the four relatives, indicating the boundaries of the reserve, was communicated to the Land Office in March, 1856, to be designated on the plats of survey; But in consequence of some error or ambiguity in Armstrong's description, so much delay occurred in identifying the proper site, that when the position of the land selected was definitely ascertained,

40 it was found that a portion of it had been settled upon and was occupied and claimed by George E. Nettleton, an Indian Trader, under the second above recited clause of the treaty which secured preemption rights in certain cases, and that another portion was claimed by a brother of said Nettleton as was understood under the same provision.

No investigation as to the legality of these claims, however, has been made inasmuch as it was alleged that the relatives of the Chief holding his interest authorized Agent Gilbert to select a body of land containing as near as could be one square mile contiguous to the Nettleton's claim, thereby releasing all claim to the two quarter sections in dispute, and in a communication of the 10 July, 1857, the Commissioner of Indian affairs requested that I should submit the selection thus made by Agent Gilbert for your approval.

Two difficulties however suggested themselves to my mind which prevented my complying with his request at that time. First, the new selection made by Agent Gilbert contained an aggregate of 662 62-100 acres, or an excess of 22 62-100 acres over the amount granted by the treaty.

And second, I was not entirely satisfied as to the acquiescence of Buffalo's grantees in the relinquishment of the two quarter sections in controversy. The Comm'r., however, in a report of the 24 Feb.
41 last, says that any reduction of the reserve by an observance of sub-divisional lines of the different sections would give the grantees less land than they are entitled to, and such reduction would not conform so closely to the requirements of the treaty as the boundaries recommended by him. In regard to the second point, all difficulty has been obviated by the receipt through Agent Fitch of a paper containing the written consent of the grantees to the modification of the reserve as at present proposed.

Now, therefore, under all the circumstances of the case, it having been fully proved that these relatives of the Chief Buffalo acquiesce in the selection made for them by Agent Gilbert and desire that patents should issue to them for this land, and the Commissioner of Indian affairs having recommended such approval, I have respectfully to request that you will approve the same, in order that patents may issue in accordance with their request as follows, viz:

To Matthew May-Dway-Gon, sw¼ sec. 22, T. 50, N., R. 14 w. 160 acres.
" Antoine May-Dway-Gon, e½ ne¼, sec. 28 } Do do do
and w½ nw¼, sec. 27. } 160 acres.
To Joseph May-Dway-Gon se¼, sec. 28, T. 50, N., R. 14, w. 160 acres.
" Shaw-Bwaw-Skung or } w½, sw¼, sec. 27. } " " "
42 Benjamin G. Armstrong. } lot No. 3, " 34. } " " 182 62-100
" " 5, " 27. }

Very respectfully,
Your ob't. serv't,
J. THOMPSON,
Secretary.

To the President:

. . . . . .

I hereby approve the selections made as described herein and patents will issue accordingly.

JAMES BUCHANAN.
Sept. 24, 1858.

Exhibit F.

UNITED STATES OF AMERICA,

To all whom these Presents shall come, Greeting:

Whereas, by the sixth clause of the second article of the treaty between the United States of America, and the Chippewa Indians, of Lake Superior, and the Mississippi, made and concluded at La Pointe, in the State of Wisconsin, on the thirtieth day of September, eighteen hundred and fifty-four,—it is stipulated that "the Ontonagon band and that sub-division

of the La Pointe band, of which Buffalo is Chief, may each select on or near the lake shore four sections of land, under the direction of the
43 President, the boundaries of which shall be defined hereafter,—and being desirious to provide for some of his connections who have rendered his people important services, it is agreed that the Chief Buffalo may select one section of land, at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct."—and, whereas, it appears from a return dated the twenty-seventh day of September, one thousand eight hundred and fifty-eight, from the office of Indian affairs to the General Land Office, that there has been selected, and approved for "Shaw-Bwaw-Skung, or Benjamin G. Armstrong," as one of the "connections" of said Chief Buffalo, the west half of the south-west quarter, and lot number five, both of section twenty-seven, and lot number three of section thirty-four, containing together one hundred and eighty-two acres and sixty-two hundredths of an acre, all in township fifty north, of range fourteen west of the fourth principal meridian, in the State of Minnesota:

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the clause of the said treaty as above recited:

Have given and granted, and by these presents do give and grant unto the said "Shaw-Bwaw-Skung, or Benjamin G. Armstrong," and to
44 his heirs, the tract of land above described; to have and to hold the said tract, with the appurtenances, unto the said "Shaw-Bwaw-Skung, or Benjamin G. Armstrong," and to his heirs and assigns forever.

In testimony whereof, I, James Buchanan, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this twenty-third day of October, in the year of our Lord, one thousand eight hundred and fifty-eight, and of the Independence of the United States the eighty-third.

[SEAL OF GENERAL LAND OFFICE.]

BY THE PRESIDENT:

JAMES BUCHANAN,

M. GRANGER,
Recorder of the General Land Office.

By T. J. ALBRIGHT,
Sec'y.

Recorded Vol. II, pages 376, 377.

Exhibit G.

This indenture made the thirty-first day of August, in the year of our Lord, one thousand eight hundred and sixty-four, between Benjamin G. Armstrong and Charlotte Armstrong, his wife, of the County of La Pointe, in the State of Wisconsin, of the first part, and John M. Gilman, of the County of Ramsey and State of Minnesota, of the second part.
45 Witnesseth,—that the said party of the first part, for and in con-

sideration of the sum of five hundred dollars to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quit-claimed, and by these presents do remise, release and quit-claim unto the said party of the second part, and to his heirs and assigns forever, all the following described pieces or parcels of land, situated, lying and being in the County of St. Louis and State of Minnesota, and known and designated as follows, viz: The undivided one-half of the south-west quarter of section number twenty-two (22) and the west half of the south-west quarter and the west half of the north-west quarter, and lot number five of section twenty-seven (27) and the south-east quarter and the east half of the north-east quarter of section twenty-eight (28) and lot number three, section thirty-four (34) all in township numbered fifty (50), north of range number fourteen (14) west of fourth principal meridian, meaning the premises which were selected, offered and reserved to the heirs of the Chief Buffalo by the President of the United States, Sept. 24th, 1858,—

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any appertaining: And the reverson and reversions, remainder and remainders, rents, issues
46 and profits thereof: And also the estate right, title, interest, estate property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to the above described premises, and every part and parcel thereof with the appurtenances. And the said parties of the first part for themselves, heirs, executors, administrators do covenant, promise and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, that they have not made, done, committed, executed, or suffered any act, or acts, thing or things whatsoever, whereby, or by means whereof the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall, or may impeaced, changed or incumbered in any manner or way whatsoever.

In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

B. G. ARMSTRONG, [SEAL.]

her
CHARLOTE X ARMSTRONG. [SEAL.]
mark.

Signed, sealed and delivered in the presence of

S. S. VAUGHN,
T. J. L. TYLER.

STATE OF WISCONSIN,
47 *County of La Pointe, ss.*

Be it known that on this thirty-first day of August, A. D. 1864, before me, the undersigned, personally came Benjamin G. Armstrong and

Charlote Armstrong his wife, to me known to be the persons described in, and who executed the within deed and acknowledged that they executed the said deed freely and voluntarily for the uses and purposes therein specified.

And the said Charlote Armstrong, wife of the said Benjamin G. Armstrong, on a private examination by me, separate and apart from her said husband, acknowledged that she executed the said deed freely and voluntarily, without fear or compulsion from anyone.

S. S. VAUGHN,

[NOTARIAL SEAL.] *Notary Public.*

And afterwards, to-wit: on the 2nd day of September, A. D. 1884, the following bond was filed of record in said cause, in words and figures following, to-wit:

Know all men by these presents that we, Frederick Prentice of New York City, New York, Edwin Ellis, of Ashland, Ashland Co., Wis., and S. H. Brown, of Milwaukee, Wis., are held and firmly bound unto Orzora P. Stearns in the full and just sum of three hundred (300) dollars, to be paid to the said Orzora P. Stearns, his executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 21st day of August, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas, lately at a general term of the Circuit Court in and for the District of Minnesota, in a suit depending in said Court between Frederick Prentice and Orzora P. Stearns, a decision and judgment was rendered against the said Prentice, and the said Frederick Prentice having obtained a writ of error amd filed a copy thereof in the Clerk's office of the said Court, to reverse the decision and judgment in the aforesaid suit, and a citation directed to the said Orzora P Stearns citing and admonishing to be and appear at a Supreme Cou t of the United States, to be holden at Washington the

48

Now the condition of the above obligation is such, that if the said Frederick Prentice shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void else to remain in full force and virtue.

FREDERICK PRENTICE, [SEAL.]

Sealed and delivered in the presence of
J. J. MILES and
N. H. HENCHWAUB, JR.

EDWIN ELLIS, [SEAL.]

J. J. MILES and
N. H. HEANCHMAN, JR., as to signatures of Ellis & Brown.

S. H. BROWN, "

We are satisfied with the foregoing bond and waive jusitfication by the sureties.

Aug. 25, 1884.

J. M. GILMAN,
G. E. COLE and
W. W. BILLSON,
Solicitors for Deft.

49 I hereby approve the within bond and allow a writ of error.

R. R. NELSON,
Judge.

Endorsed—filed Se t. 2, '84.

O. B. HILLIS,
Clerk.

And afterwards, to-wit; on the 5th day of September, A. D. 1884, the following præcipe for a writ of error was filed in this cause in the words and figures following:

PRAECIPE FOR WRIT OF ERROR.

FREDERICK PRENTICE,
vs.
ORZORA P. STEARNS.

50 OSCAR B. HILLIS, Esq., Clerk:

Sir:

Plaintiff herein having filed his appeal bond duly approved by Hon. R. R. Nelson, al o a citation duly signed by him; with admission of service by defendant endorsed thereon, you will please issue a writ of error in said cause and lodge a copy thereof in your office, and make return forthwith to the Supreme Court of the United States of all pleadings and proceedings in said cause.

Dated Sept. 5th, 1884.

REA, KITCHEL & SHAW.
Attorneys for Plaintiff.

B. A. WILLIS,
C. K. DAVIS,
Of Counsel.

And pursuant to the said præcipe the following writ of error was issued:

WRIT OF ERROR. - Page - 5

UNITED STATES OF AMERICA, ss.

51 *The President of the United States,*

TO ORZORA P. STEARNS:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court for the District of Minnesota.

Wherein Frederick Prentice is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at St. Paul in said District, this 28th day of August, A. D. 1884.

R. R. NELSON,
Judge.

Personal service of the above citation by delivery of the original of which the foregoing is a copy, at Duluth Minnesota, admitted
52 this 3rd day September, A. D. 1884.

ORZORA. P. STEARNS.

Endorsed:

Filed Sept. 5th, 1884.

OSCAR B. HILLIS,
Clerk.

UNITED STATES OF AMERICA.

CIRCUIT COURT OF THE UNITED STATES,

District of Minnesota, ss.

I, OSCAR B. HILLIS, Clerk of said Circuit Court, do hereby certify and return to the Honorable the Supreme Court of the United States, that the foregoing, consisting of 26 pages numbered consecutively from 5 to 30 inclusive, is a true and complete transcript of the RECORDS, PROCESS, PLEADINGS, ORDERS, FINAL JUDGMENT and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

53

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, at Saint Paul, in the District of Minnesota, this 13th day of Sept. in the year of our Lord one thousand eight hundred and eighty-four and of the Independence of the United States the 109th year.

SEAL U. S. CIRCUIT COURT, DIST. OF MINN.

OSCAR B. HILLIS,

Clerk.

13-435

SUPREME COURT OF THE UNITED STATES.

No. 1157.

FREDERICK PRENTICE, PLAINTIFF IN ERROR,

vs.

ORZORA P. STEARNS, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Argument of Plaintiff in Error, with Brief of Points and Authorities.

BENJAMIN A. WILLIS,
Counsel for Plaintiff in Error,
2 Wall Street,
NEW YORK CITY.

CALLAHAN & GARTLAN, Printers and Stationers, 30 Pine St., N. Y.

SUPREME COURT OF THE UNITED STATES.

FREDERICK PRENTICE,

PLAINTIFF IN ERROR,

VERSUS

ORZORA P. STEARNS,

DEFENDANT IN ERROR.

STATEMENT OF FACTS.

Action brought in ejectment to recover possession of premises described in the complaint.

The answer denies plaintiff's title, sets up ownership to one undivided half, and a purchase of a color of title as to the remaining half.

Trial by Court—jury waived. Decision in favor of defendant, and judgment rendered thereupon, with costs.

Plaintiff has obtained writ of error to reverse the decision and judgment aforesaid.

Plaintiff in error claims, under a deed dated September 11, 1856, and recorded November 4, 1856, from one Benjamin G. Armstrong, a reservee or appointee of Buffalo Chief, who, by virtue of a treaty with the United States, became entitled to select a section of land, in the County of St. Louis and State of Minnesota, subject to change of location by the President, and adjustment of boundaries, by the United States authorities, as by the terms of said treaty provided.

Such conditional selection was made, and said Benjamin G. Armstrong was designated by Buffalo Chief as his reservee and appointee on the date of said treaty (September 30, 1854). The selection aforesaid was changed somewhat, and boundaries adjusted pursuant to said treaty, and a patent issued to Armstrong, reciting the treaty, the designation of the patentee, Armstrong, in virtue of the treaty, by "Buffalo Chief" as his beneficiary and connection, to whom a patent was to be issued, &c.

The date of the patent was October 23, 1858, so by virtue of the treaty, the ratification thereof, January 10, 1855, and his designation, as reservee, the legal title which vested by the patent in Armstrong, enured for the benefit of this plaintiff.

October 28, 1859, said Armstrong conveyed the other undivided half of premises in question to Kelly and Cash.

August 31, 1864, said Armstrong gave a quit-claim deed of one-half of the premises to John M. Gilman.

Gilman, on the trial, testified he took the deed, held it temporarily and turned it over, for about the sum, he gave—$500, to some one else. That he acted, for other parties. No proof was put in, that the real parties in interest, were ignorant of Prentice's deed.

It was admitted, that defendant in error was in possession under mesne conveyances from Cash, Kelly and Gilman, and made valuable improvements, but no knowledge of, or acquiescence in, any expenditure on plaintiff's part, was shown. Answer admits premises were vacant and unoccupied until 1880.

The sufficiency of the deed to Prentice as to form, execution and record is not questioned.

There was no essential controversy upon the trial, as to questions of fact, except such as grew out, of the construction and legal effect to be given to deeds, public documents, &c.

The deed given to Armstrong, September 11, 1856, was subsequently ratified and confirmed by a new deed given to plaintiff in error, by said Armstrong and wife bearing date August 27, 1872.

LIST OF PLAINTIFF'S EXHIBITS.

1. Treaty, United States and Buffalo Chief, September 30, 1854.
2. Ratification thereof, January 10th, 1855.
3. Records from Interior Department, showing selection of section, designation by Buffalo Chief of Armstrong, and change of location together with adjustment of boundaries, pursuant to article 3 of treaty.
4. Patent to Armstrong.
5. Deed, Armstrong to Prentice (original.)
6. Confirmatory deed, Armstrong to Prentice.

ASSIGNMENT OF ERRORS.

1st. The Circuit Court erred in finding as a fact "that the land Buffalo had in view and intended in his designation (set forth in the 3d Finding of Fact), is not included, nor any part thereof, in the patent subsequently issued by the United States to the relatives of Buffalo."

2d. The Circuit Court erred in finding as a fact "that a large portion of the land embraced within the courses and distances of said deed, is covered by water, and that portion which is not covered by water in said description, is land which Chief Buffalo had in view, and intended to embrace in his selection, as aforesaid, but does not embrace the land involved in this suit."

3d. The Circuit Court erred in its ninth Finding of Fact, as set forth in full, though several details contained in it, are accurate.

4th. The Circuit Court erred, in finding that Gilman, through whom defendant claims, took his deed, without actual notice, of Armstrong's deed, to this plaintiff.

5th. The Circuit Court erred in finding, as a conclusion of law, "that the description in the deed of said Armstrong, to plaintiff, of September

11th, 1856, is insufficient to convey his interest in or title to any other or different tract of land to which he might have been, entitled under said treaty, than the specific tract described by metes and bounds therein, and that said deed is ineffectual, as a conveyance to plaintiff of any interest or title, except such as said Armstrong had, in or to the land therein, particularly described, and that plaintiff thereunder, took no title to the land, for the possession of which, this action is brought."

6th. The Circuit Court erred in finding, as a conclusion of law, "that the plaintiff is not entitled to recover."

7th. The Circuit Court erred, for the reason that the law, the evidence, and the equities of the case, are in conflict with the Findings of Fact, and conclusions of law above referred to.

8th. The Circuit Court erred in refusing to find that Armstrong on the 11th day of September, 1856, had a conveyable interest in the land, renewed by the treaty, dated September, 30th, 1854; that by his deed of the 11th day of September, 1856, he actually did convey his interest in the lands reserved by the treaty to this plaintiff; that the lands reserved by the treaty were patented to Armstrong on the 23d day of October, 1858; that the recitals in the patent are conclusive, as to the identity of the land; that upon the issuance of the patent, the full legal title to the land reserved by treaty aforesaid, vested in this plaintiff; that after the deed of Armstrong to plaintiff, said Armstrong had no interest in any lands which he could lawfully convey to Gilman; that Gilman had sufficient notice of plaintiff's deed; of the equitable title vested in him; of the recitals in the patent; of the treaty of the designation of the tract; of the naming of Armstrong, as his appointee, that Gilman was not a *bona fide* purchaser without notice.

9th. The Circuit Court erred in not finding that the patent related back to the date of the treaty, so that Armstrong and all in privity with him, including his grantees, are estopped from disputing the plaintiffs' title to the patented lands.

ARGUMENT.

The plaintiff in error proposes, with a view of confining the controversy before this Court to the utmost, to present, the conclusions of law found in his favor, by the Circuit Court, which were, nevertheless, urgently combatted, at the trial, by the defendant in error.

I.—That the appointment of persons to whom the United States were to convey the section of land, reserved by the said provision of said treaty, made by the said Chief Buffalo, on the 30th day of September, 1854, was a valid and sufficient appointment under said provision, and upon the ratification of said treaty, vested in the said Benjamin G. Armstrong, and the other appointees named, such an interest as the treaty gave to the land reserved.

II.—That the patent of the United States to Armstrong, and his acceptance of it, is a valid execution of the treaty on that subject.

III.—That the deed from said Armstrong to plaintiff, of date of September 11, 1856, is, in its execution, acknowledgment and recording, a valid and sufficient deed, and its record is constructive notice of its contents.

V.—That the quitclaim deed, from Armstrong to said John M. Gilman, of August 31, 1864, conveyed to said Gilman, such interest and no more, as said Armstrong, had in the land therein described, at the date of said deed.

The Circuit Court, have so far accepted the theory of the plaintiff that, to be logical, it should have gone farther and accepted the rest.

We insist that the appointment of Armstrong, our grantee, as party to receive the patent, was valid and took effect on the 30th of September, 1854; that the appointment of Armstrong vested in him such an interest as the treaty gave to the land reserved by said treaty. We insist, that the issuance of the patent to Armstrong, was a valid execution of the treaty; that Armstrong's deed was in all respects valid and effective and notice of its contents, so the Court below held. And the sole question of difference wherein the Court opposed the plaintiffs' theory, was this, "that the description in the deed to plaintiff," did not correspond with the description of the lands contained in the patents; that the deed could convey only what was within certain metes, bounds and distances therein contained. Here then is the point of controversy, out of which several serious questions arise which will be hereafter discussed.

The grantee of the plaintiff had in eo instante "when the treaty was ratified, such an interest as the treaty gave to the land so reserved." A section of land was so reserved, by a provision of said treaty. Now Armstrong had a conveyable and assignable interest, this the Circuit Court adjudged to be so; the current of authorities on this point is uninterrupted, as will appear by reference, to the following among numerous other authorities that might be cited:

Sims *v.* Irvine, 3 Dallas, 455.
Crews *v.* Burcham, 1 Black, 352.
Doe *v.* Wilson, 24 How.
Landis *v.* Brant, 10 How., 348.
Act May 20, 1836, Rev. Stat. 1878, ch. 11, sec. 2448.

He attempted to convey, and it is found as a fact, by the Circuit Court that said Benjamin G. Armstrong and his wife, on September 11, 1856, made, executed, acknowledged and delivered to plaintiff herein, a valid deed of conveyance, a copy of which is attached to the findings of fact by the Court below, marked Exhibit "B," and made a part thereof (see page 18, of transcript of record), which said deed, contained the following description of the land, property or interest thereby conveyed, viz.: "Beginning at a large stone or rock at the head of St. Louis River Bay, nearly adjoining Minnesota Point, commencing at said rock and running east one mile, north one mile, west one mile, south one mile to the place of beginning, and being the land set off to the Indian chief 'Buffalo,' at the Indian treaty of September 30, A. D. 1854, and was afterwards disposed of by said 'Buffalo' to said Armstrong. and is now recorded with the Government documents, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, to have and to hold the aforesaid prem-

ises, with all the privileges and appurtenances to the said premises belonging or appertaining, unto the said party of the second part, his heirs and assigns forever; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to, the above described premises, and every part and parcel thereof, with the appurtenances."

PRELIMINARY TO THE POINTS.

Was there by the treaty of September 30, 1854, a section of land reserved for Buffalo Chief or his appointees?

The Court finds, yes.

Was Armstrong, Prentice's grantee, legally designated on the 30th of September, 1854, as a proper party to whom a patent should be issued?

The Court finds, yes.

When did the reservation of the land and the designation of Armstrong become effective?

The Court finds, at the date of the ratification of the treaty, January 10th, 1855.

Was the patent issued to Armstrong, subsequently, according to the terms of the treaty?

The Court finds, yes.

Did Armstrong, upon the ratification of the treaty, the land having been reserved, and he having been designated, have an interest in the treaty which he could assign and convey?

The Court finds, yes.

Did Armstrong execute a good and sufficient deed, adequate to convey the land described in it, which deed was constructive notice to the world of its contents?

The Court finds, yes; such deed was executed September 11, 1856, and recorded in St. Louis County, Minn., November 4, 1856. The foregoing questions, then, are without the range of discussion.

Here is where the controversy begins:

On the 11th of September, 1856, what did Armstrong own?

The land set-off, by the treaty.

What land was set off by the treaty?

A section in the County of St. Louis and State of Minnesota.

Was it located; yes, but subject to survey (See recital in patent, "boundaries to be defined hereafter.")

Now, there was but one Buffalo Treaty; There was a reservation, of but one section, according to the recitals of the patent, which under the decisions, preclude all controversy. A patent, was issued, for the lands so reserved (See recital in patent, "in consideration of the premises, and in conformity with the clause of the Treaty.")

Then, the only remaining question which arises is what Armstrong by his valid deed of September 11, 1856, duly recorded, conveyed to Frederick Prentice, the plaintiff, in error. He conveyed something—he owned no other land, than that reserved, by the *treaty*. If at the date of the deed, no land, had been reserved, no conveyable or assignable interest, in the Treaty had vested in A, then, of course, he conveyed nothing; but it is admitted, it is solemnly adjudged by the Court, that he had a conveyable interest, although the Court finds as a matter of law, and, as we claim, erroneously, "that said deed was ineffectual as a conveyance to plaintiff, of any interest or title, except such as said

Armstrong had in and to the land therein particularly described; and the Court further finds, as a *matter* of fact, "that a portion of the property embraced within the courses and distances of said deed is land, which *Chief Buffalo had in view*, and *intended to embrace in his selection.*" That admission is fatal to the contention, persisted in, by the defendant *in error*, and would make any result, otherwise than what, we contend for, unconscionable.

Therefore something, was conveyed to Prentice. He paid eight thousand dollars consideration, for that something.

What was it?

An equitable title, to the lands reserved by the treaty.

But it is assumed that the courses and distances in the deed do not correspond with the description in the patent.

I.

Doctrine of Relation as Applied to this Case.

Can this assumption, in view of the luminous exposition of this Court, relating to the conclusiveness of patents, be tolerated? A volume of authorities could be presented, involving the precise question, now being discussed—but a few will answer the purpose.

In Crews *v.* Burcham, 1 Black, U. S., page 352, the Indian Nation, ceded all lands to the United States, except the reserved sections, which were to be patented by virtue of treaty, October 27, 1832.

Reservations were to be selected, to correspond with the public survey.

Besion was a reservee, and on February 4, 1833, for a valuable consideration, conveyed all his right and interest in a half section to Armstrong, under whom complainants claimed, title. Selection was afterwards made pursuant to the treaty, and a patent issued February 17, 1845. Besion died before the issuance of the patent. Reservee's deed was recorded.

Defendants claimed under deed of heirs of reservee. Objection was taken on trial, that a portion of one-half section, did not lie within the district of country ceded, by the treaty, and the point raised that the description in the deed did not correspond with that in the patent.

This Court overruled the point and held that the recitals were conclusive, and that the patents related back, to the date of the treaty.

Can ingenuity suggest a distinction between this case, and the one at bar? Any difference at all, would be favorable to the plaintiff in error, for the land in the deed, is in same country, and belongs admittedly to the ceded territory. The Treaty of September 30, 1854, ceded lands, excepting those reserved, which were to be located and patented, just as in Crews *vs.* Burcham; Buffalo Chief, like Besion was a reservee; Armstrong was his appointee; Armstrong, like Besion conveyed, for a valuable consideration the land "set off by the Treaty to the plaintiff, the plaintiff recorded his deed, which was dated September 11, 1856; on the 4th day of November, 1856, which was notice of its contents, the selection was made and patent issued to Armstrong October 23, 1858; Buffalo, the original reservee, had died previously."

The defendants claimed, under a subsequent quit claim, from Armstrong to Gilman, for the nominal sum of five hundred dollars.

Objection in this case as in the other, was made, that the description in the deed was different from that in the patent.

Why, therefore should not the Court overrule that objection in this suit, as well? The parallelism is astonishing, and yet the case of Doe *vs.* Wilson, 23 How., is equally so, in all essential particulars, where the action also grew out of the Pottowattame Treaty of October 27, 1832. The Indians ceded particular territory to the United States, excepting certain reservations for which the Government agreed to issue patents. Petchico a reservee, after the ratification of the treaty, to wit: February, 1833, conveyed to Alexis Coquellard and David H. Colluck, "All those two sections of land lying in the State aforesaid in the region of Country or Territory ceded by the Treaty of 27th October, 1832."

This was the entire description; and although, as Judge Catron said in his decision: "It is assumed that the lands embraced in the patents to Prentice made in 1837, do not lie within the section of country, ceded by the Treaty of 27th October, 1832," although the description so declared, yet when the point was made that the land in the deed differed from that in the patent, it was promptly decided that the recitals in the patent, were conclusive.

Can the import of this decision be misunderstood?

In this action it is conceded, that the description in the deed was within, the Territory ceded to the United States; that it was selected by Buffalo Chief, pursuant to the Treaty. It is clear that Armstrong had in contemplation when he gave his deed to Prentice, the same land Buffalo Chief had, when he directed the United States authorities to issue patent to his appointees. Whatever right Buffalo gave to Armstrong, in contemplation, Armstrong conveyed to Prentice.

Prentice succeeded to all of Armstrong's rights under the Treaty.

In

Landes *vs.* Brandt, 10 How., 372,

we find the same doctrine enunciated, the same rule laid down; it held: "That when the patent issued, it related back to the inception of the title, and must be taken as between the parties to the suit, to bear date with the commencement of the title. In that case, at the date of the deed, there had been no location, no patent had been issued; the description contained, the quantity of land alone, which, by the terms of the treaty, was reserved.

But the case of Landes *vs.* Brandt holds to a doctrine, more rigid than we are obliged to apply, in this case—it was then held, that even before, the confirmation of the right, the conferee had a right, subject to sale and execution, and that the subsequent confirmation, did not destroy the title under the Sheriff's deed; neither did the patent, subsequently taken out under the title, of the original claimant, avoid the Sheriff's deed. The patent went back by relation to the original presentation of petition. It consequently inured, to the benefit of the alienee. Before its issuance, the title was equitable; in that case, the property was taken from the original claimant, by process of law; here, in our case, the claimant, Armstrong, voluntarily under seal, sells by valid deed, what was set off by the treaty; here, too, the doctrine of estoppel, which is predicated on moral grounds, operates with a hundred-fold more force.

How, then, can it be, that the doctrine of relation does not apply, in this case, so as to give Prentice, the plaintiff in error, the benefit of the

subsequent patent? How can it be that in determining, what was set off by the treaty of September 30, 1854, we cannot refer to the patent and regard it as contemporaneous. To deny the plaintiff this, will be to reverse an unbroken array of authorities, which it would exhaust the patience of the Court to examine. Cruise on Real Property (fol. 5, pp. 510, 511), lays down the doctrine thus emphatically: "There is no doctrine better founded in law, reason and convenience than this; that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part, by relation."

In this suit it relates back to the date of the treaty. The moment the patent issued to Armstrong the equitable title of Prentice ripened into an absolute legal title. All intermediate conveyances from the date of the treaty to the patent, are conveyed by the legal title, and pass that title to Prentice, the alienee; for,

"Where there are divers acts, concurring to make a conveyance, "estate or other thing, the original act shall be preferred, and, to this, "the other acts shall have relation."

Viner's Abridgment Title Relation, 290.
Jackson *vs.* McMichael, 3 Cowen, 75.

How applicable and appropriate in the discussion of this appeal, the following propositions:

"The doctrine of relation takes place, where it is necessary for the "preservation of the estate, or to promote the ends of justice."

Jackson *vs.* Bull, 1 John Cas., 89, 85.

"Or to render intermediate sale to grantee valid."

Johnson *vs.* Stagg, 2 John R., 510.

"Or to enable a grantee to sustain an action for trespass after a con-"tract, but before a deed."

Heath *vs.* Ross, 12 John, 140.

"Or to prevent a purchaser at a Sheriff's sale from contesting the "validity of a mortgage in an ejection, a bill having been filed before "execution of a Sheriff's deed, but after sale."

Jackson *vs.* Thompson, 15 John, 309.

"Or when a patent issues, no matter how long after the entry, it shall "relate to the entry, and take date with it."

Ross *vs.* Barland, 1 Pet., 655.

"The fiction of relation is, that an intermediate, *bona fide* alienee of the incipient interest, may claim that the patent inures to him, by an *ex post facto* operation, and receives therefrom, the protection at law, that a Court of Equity would give him.

French *vs.* Spencer, 21 How., U. S., 228.
Perryman's Case, 3 Coke, 84.
Jackson *vs.* Rowland, 6 Wend., 666.
Wheelwright *vs.* Wheelwright, 2 Mass., 447.

Could there have been conceived language more appropriate, or principles more applicable to our purpose than those just recited?

Admitted plaintiff in error paid $8,000 to Armstrong for premises set off by treaty, that the deed was valid and sufficient to convey;

That land had been located, subject to change of boundary, precisely as provided by treaty; that Armstrong was, at date of deed, vested with such interest as treaty gave to Buffalo;

That the issuance of the patent, was a valid execution of the treaty;

And you have a state of facts which makes this a stronger case, for the application of the doctrine of relation, than any cited in the brief. To hold otherwise would be to countenance fraud, would be to tolerate collusion between the plaintiff's grantor and Gilman, who only paid $500 for his quitclaim, in 1862. It is admitted, too, and so found by the Circuit Court, that the deed to Prentice; which recites the treaty; that the land was set off by "Buffalo," and disposed of by him to Armstrong, &c., was recorded in the Register's office of the county where the property was located, and was constructive notice to the world of its contents.

Shall the supposed discrepancy, that the land "located by Buffalo by virtue of the treaty" is not the same as the land patented, by virtue of the same treaty," defeat the intention of the parties? Shall fraud become operative for such a cause? And that too, when in,

Crews *vs.* Burcham, and
Doe *vs.* Wilson,

the land conveyed was admittedly, not within the ceded territory, and yet the recitals of the patent were held conclusive.

Then, without further elaboration, let this proposition be distinctly stated and submitted.

Armstrong and the defendant, who is his privy, are, by virtue of the deed to the plaintiff, estopped from denying that said Armstrong was seized and possessed of the premises in dispute at the date of the conveyance.

That the estoppel operates upon the estate and binds the after-acquired title between the parties and their privies.

That the recitals in the patent, that the section was the one selected by the President, and to which the appointee, Armstrong, was entitled under the treaty, are conclusive as to the adequacy of the description.

II.

The defendant was not an innocent purchaser. And therefore, this controversy is to be precisely the same as though, it were between this plaintiff and his grantor, Armstrong.

(*a.*) The Circuit Court found, as a conclusion of law (see p. 16, Transcript of Record), "That the deed from said Armstrong to plaintiff, "of date of September 11, 1856, is, in its execution, acknowledgment, "and recording a valid and sufficient deed, and its record is constructive "notice of its contents."

(*b.*) The Circuit Court found, as conclusion of law (see p. 17, Transcript of Record), "That the quitclaim deed from said Armstrong to said John M. Gilman (defendant's grantor), such interest and *no more*, as said Armstrong had at the date of said deed (August 31, 1864).

(*c.*) The deed contained in the body thereof, in addition to the metes and bounds which was a conditional description, the boundaries of which, by law, were liable to be changed; the following: "*And being the land set off to the Indian chief Buffalo, at the Indian Treaty of September* 30,

A. D. 1854, *and was afterwards disposed of by said 'Buffalo' to said Armstrong, and is now recorded with the Government Records.*"

It seems, in view of the conclusions of law quoted, a work of supererogation to *discuss* this point.

Gilman took his deed, subject to any rights, equities or demands or interest or property or ownership, which vested in Prentice, the plaintiff.

The defendant, in order to give effect to the *quitclaim* deed from Armstrong to Gilman, relies upon the following provision of the Minnesota Statutes of 1851, to wit, Sec. 3 chap. 46: "A deed of quitclaim and release of the form in common use shall be sufficient to pass all the estate which grantee could, *lawfully convey* by deed of bargain and sale.

There must be something for the deed to operate upon to be a sale or a bargain; there must be a subject matter. In this case there was nothing; the grantor, at the date of the deed, owned nothing which he could *lawfully* convey; therefore, the statute is wholly inapplicable to the Gilman deed.

Martin *vs.* Brown, 4 Minn., 201, holds "The Legislature, by the term 'lawfully convey' intended to limit the estate to such as the grantor has a legal right to convey, then as he may not lawfully convey, that which he has already conveyed to another, but may release any real or fancied interest in him; nothing passes beyond. *his actual* interest, at the time of the deed, whatever it may be. When, therefore, a party relies on a mere quitclaim of the interest, which a party may have in the property, he does so at his peril, and he must see to it that there is, an interest to convey. He is presumed to know what he is purchasing, and takes at his own risk," &c.

Same construction given to the statute in

Hope *vs.* Stone 10 Minn,, 152.
Everit *vs.* Sums, 16 Minn.,' 26.
Marshall *vs.* Roberts, 18 Minn., 405.

Now, what did Gilman, have notice of?

The recitals in the deed—and let it be here referred to, though it is indisputable. The reference to the treaty, in the deed to Prentice, makes the treaty, itself, a part of the grant.

Vance *vs.* Fore, 24 Cal. 435.
29 Minn., 276.
Erskine *vs.* Moulton, 66 Maine, 276.

Nothing is better understood as a rule of construing deeds, than that "a reference to a deed, in another deed, makes it a part of the description, and is as though it was incorporated in that deed and formed a part of it."

Jackson *vs.* Parkhurst, 4 Wend., 369.
French *vs.* Carhart, 1 Comst., 96.

In Jackson *vs.* Parkhurst, the property could not have been located, and the deed would have been for that reason, absolutely void if the words "that I purchased from Richard M. McCardy" had been omitted. That was the significant expression, which was designed by the parties to designate the premises, intended to be conveyed. It became, by reference to the deed, part of the deed in question. Does it require a stretch of fancy, to apply the foregoing authorities, to the deed in question? It squares with it, in every view.

The treaty was a part of the deed; the government documents; the Commissioner's return, on which the patent was based; the incipient,

conditional location, the metes and bounds of which were, by the very treaty, which is a part of the deed, subject to change; the land set-off at the treaty to the chief Buffalo, and disposed of by Buffalo to Armstrong; these facts were in the deed, legally speaking, and all indicate the intent of the parties; the circumstances under which it was attempted to define metes and bounds; why they were modified; the payment of $8,000 by plaintiff in error to Armstrong. All these facts constitute the contents of the deed, and according to the conclusions of law before referred to, Gilman had notice thereof.

Gilman and his grantors, also had notice of the recitals in his own deed in these words, "meaning the premises selected and reserved to the heirs of the Chief Buffalo." Does not this overwhelmingly demonstrate the identity, of the land as that, set-off by the treaty?

Further, Gilman and his grantors also had notice of the patent, under which they claim, which recites "the claim of the treaty of September 30, 1854, authorizing Chief Buffalo to select a section of land in the ceded territory, and designate the person or persons to whom the United States shall convey it, and also the fact that such selection has been made, as appears from the return, dated the 27th day of September, 1858, from the official Indian affairs to the General Land Office, and the further recital that the said patent, issued in conformity with the said treaty, as thereinbefore cited.

The forgoing recitals charge Gilman and all persons claiming under him with actual notice of every act done, of every step taken, of ever paper executed, constituting the record of the transaction and in the completion of the title from the ratification of the treaty, to the issuance of the patent. Not only notice of every thing contained in the treaty and in the return showing the selection specially mentioned, but of every material fact, appearing on the files and records of the Indian office and General Land office, including the understanding between the Receiver and the Government, substituting other lands in lieu of those selected by Buffalo, pursuant to the treaty, which was a pa: of the Prentice deed. They charge Gilman, and his grantees of notice, of the date, when Armstrong had a conveyable interest, under the treaty, also of the proceedings had relative to the selection of the land, as well as every fact affecting the title of the patentee to the land conveyed; from the ratification of the treaty to the date of the patent.

Wade on Notice Sects. 307 to 315 inclusive.
Buckhart *vs.* Bucher, 2 Binney, 455,

Therefore they had notice, of Armstrong's deed, to plaintiff.

The description in the deed, is assuredly, definite enough to make clear the intention of the parties.

Therefore the doctrine of relation and estoppel, operates equally against Armstrong, Gilman and this defendant, and this action is to be regarded as though it were brought against Armstrong himself.

Gilman and his grantees, supposing the findings of the Circuit Court are just and accurate, had sufficient notice to put them upon inquiry, which would have resulted in the ascertainment of plaintiff's equities. We have shown that in taking a quitclaim deed they took, at their peril, subject to plaintiff's equities.

Now it is evident enough that Prentice paid $8,000 for the land set off at the Indian treaty to Chief Buffalo, and disposed of by Buffalo to Armstrong.

By operation of law supposing the deed ineffective, or there being no

deed, the vendor on the payment of the purchase money, would become a trustee, of an implied trust. The grantor, when he took title, took it in trust for the plaintiff, and Gilman or his grantees took it, subject to same trust.

Hope *vs.* Stone, 10 Minn., 141.

Such a trust, equity would enforce.

When a title of an equitable nature arises, it must be supported by an express or implied trust in the grantor.

Sims *vs.* Irvine, 3 Dallas, 455.

Equity will interpose in favor of a party on whom the person entrusted with the execution of a power is under a moral or legal obligation to provide by an execution of a power.

Story's Eq. Juris., § 169.

When it is conceded, that an assignable and conveyable interest vested upon the ratification of the treaty, the whole fabric of the defense falls, and the objection, as to the inadequacy of description, avails nothing.

For where metes and bounds, are liable to be modified, or are to be thereafter defined, how can they be infallible? The metes and bounds under the circumstances of the case meant an attempted location, and this description is as definite as any could be in a deed, given under the circumstances; the calls are less repugnant than those in the deeds on which the successful titles were based in

Crews *vs.* Burcham, 1 Black, 352.
Doe *vs.* Wilson, 23 How., U. S. ,457.
Landt *vs.* Brant, 10 How., 348.
Boardman *vs.* Reid, 6 Peters, 344.
Stringer *vs* Young, 3 Peters, 320.

The explanation given by Armstrong in the confirmation deed to Prentice (see Exhibit C, p. 20, Transcript of Record), indicates precisely the intention of the parties, and should conclude all controversy.

It is certainly demonstrated, by what is already said that Gilman and his grantees had full notice of plaintiff's equitable title, and, being chargeable therewith, are not *bona fide* purchasers.

When a purchaser has knowledge of any fact sufficient to put him on enquiry as to the existence of some right in conflict with the title he is about to purchase, he is presumed to know the extent of the right, or to have been guilty of a degree of negligence fatal to his claim as purchaser.

Williamson *vs.* Brown, 15 N. Y., 354.

III.

The description in the deed to Prentice is clearly intelligible, and indicates the interest which it was intended to convey.

Supposing the finding of fact made by the Circuit Court, "that a large portion of the land embraced within the courses and distances of said deed (to Prentice) is covered by water, and, that portion which is not covered by water in said description, is land which Chief Buffalo had in view, and intended to embrace in his selection as aforesaid," is true. What warrant is there for the conclusion of the same finding, "but does not embrace the land involved in this suit." There is nothing in the record, to justify such inference. The patent shows nothing of the kind;

there is nothing, either in the deed or patent, to indicate what township, what section or quarter section comes within the metes and bounds of the Prentice deed. There is no warrant for the assumption.

Though the boundaries were defined differently, the bulk of the land may well have been within the patented boundaries. Attention is called to (Exhibit E, page 24 of the Transcript of Record), which is embraced in the finding of fact. It will be found that only two out of four quarter sections were relinquished, and that the additional territory given in lieu laid contiguous to the Nettleton claim. The Indian Commissioner made this selection in conformity to such changes.

Armstrong, who was a trustee of an implied trust, acted for Prentice, but there is no proof to show that the land patented, so much of it as is in suit, is not the land within the metes and bounds in the original selection.

But leaving metes and bounds out of question—supposing they are false calls—we admit that the location was liable to change; that any location is liable to change made under such circumstances. Yet there is enough of the description, which is certain to indicate the interest conveyed. In fact, a better description cannot be found in all the cases, as will presently appear.

The Circuit Court find, as a conclusion of law, "that the appointment of Armstrong, as one of the persons to whom the United States were to convey the section of land, made September 30, 1854, was a valid and sufficient appointment under said provision, and upon the ratification of the treaty vested in the said Benjamin G. Armstrong, and the other appointees named, such an interest as the law gave to the land *so reserved*" (see p. 16, Transcript of Record). So we have a valid appointee, a conveyable interest, in whatsoever land the treaty reserved. Let the belle lettres scholar find more apt words to convey the lands reserved by the treaty, not elegant, but fitting words, nevertheless, their full sense, apparent to an every-day man, words respecting which two men would rarely differ as to the meaning.

Here they are, "being the land set-off to the Indian Chief Buffalo, at the Indian Treaty, Sept. 30th, 1854, and afterwards disposed of by said Buffalo to said Armstrong, together with the appurtenances."

Webster's Unabridged Dictionary is my authority for the definitions given.

"A tract of land reserved or set apart for a particular purpose, as the Connecticut Reserve in Ohio, originally set apart for the School Fund."

The lands "reserved" then by the treaty were "set apart" for Buffalo.

Now, then, what does set-off, signify, the word used in our deed?

"To set-off, to separate from a whole, to assign to a particular purpose, to portion off, as to set-off the portion of the estate."

Now, according to this definition, the word set-off is more peculiarly descriptive, of what was done, than any other, that could be used.

The section was set-off—separated from the ceded territory; it was assigned to Buffalo for a particular purpose, to wit: to be patented in conformity with the treaty—it was set-off, as his portion.

What shall be said of an attempt to impute uncertainty to such a description, and defeat a grant for which full value ($8,000) was paid? And it is made yet plainer by the other certain words: "and afterwards disposed of by said Buffalo to said Armstrong." Surely, the efficacy of the words "disposed of," will not be questioned, nor the reference to the

"Government records." If there is such a thing as logic, it follows that if Buffalo could assign his interest to Armstrong, that Armstrong could assign his interest to the plaintiff.

The Circuit Court, finds this, (see Conclusion of Law, Transcript of Record, p. 16): "Whatever Buffalo disposed of to Armstrong, Armstrong, by the terms of his deed, disposed of to the plaintiff; to hold otherwise would *be*, to take issue with the Findings of Fact and Conclusions of Law."

Now, it is a rule of construction, that what is most material and certain, shall control.

1 Cowen, 605.

Here are absolute verities: the reference to the treaty; the treaty which thereby, becomes a part of the deed; the Government records also a part of the deed; the reference to the lands set off and disposed of by Buffalo to Armstrong, and "the appurtenances" which implies all that is incidental, and attaches to the set-off.

These cannot be disregarded.

There would *be no* contention that the description was inadequate, if the metes and bounds were excluded; these aside, and the deed is clear enough.

To illustrate.

The following deed was held sufficient.

"For value received of Daniel Hudson & Co., I hereby make over and grant for myself, my heirs and executors unto the said D. Hudson & Co., his heirs and assignes, my right and claim on the public for six hundred acres of land.

Witness my hand and seal.

Signed and witnessed.

The deed was dated 1784; the patent issued July 8, 1790, to the party giving the deed; the doctrine of relation applied, and the title in alienee was held good. See

Jackson *vs.* Alexander, 3 Johnson, 484.

How vague and indefinite and uncertain the words, "my claim on the public," compared to the words set-off (meaning assigned to the use of) to Chief Buffalo, and by him disposed of (meaning, see Webster's Unabridged) "to direct or assign for a use," "to pass over into the control of some one else," "to alienate," "to bestow," to said Benjamin G. Armstrong.

Read also description in Doe *vs.* Wilson, Crews *vs.* Burcham, Landes *vs.* Brant, Boardman *vs.* Reed, Stringer *vs.* Young, cited *supra*, and none of them approach in definiteness, the description, found in plaintiff's deed—rejecting the metes and bounds.

So regarding the metes and bounds indefinite to indicate the property, we may exclude them from consideration, and have a perfect description in these words: "The land set-off to the Indian Chief Buffalo, at the Indian Treaty of September 30, A. D. 1854, and was afterwards disposed of by said 'Buffalo' to said Armstrong, and is now recorded with the Government documents, with all the *privileges* and *appurtenances*."

IV.

Supposing there is an ambiguity, about the metes and bounds set forth in the deed, that the calls are repugnant to the latter part of the description; waiving for the moment, the right to have the correctness of the description determined conclusively, by the patent, which by relation is considered, as bearing even date, with the treaty, these propositions the Court will not question.

"A liberal construction should be put on written instruments, so as to uphold them if possible and carry into effect the *intention of the party.*"

The two rules of most general application in construing, a written instrument are,

First. That it shall, if possible, be so interpreted, "*ut res magis valeat quam pereat,*" and

Second. That such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties.

The construction, likewise, must be such, as will preserve rather than destroy. It must be reasonable and agreeable, to common understanding. It must also be favorable and near the minds and apparent interest of the parties, as the rules of law will admit, and as observed by Lord Hale, *the judges ought to be curious and subtle to invent reasons and means,* to make acts effectual according to the just intent of the parties.

Crossing *vs.* Scudamen, 2 Lee, 9.
Hob R., 277.
Willes R., 632.
Mosely *vs.* Matteaux, 10 M. and W., 533.

Deeds shall be so construed as to operate according, to the intention of the parties, if by law they may, and if they cannot, in due form, they shall operate in that which by law will effectuate the intention.

"*Quando res, not valet, ut ego, valeat quantum valere potest.*" Per Lord Mansfield.

Goodtitle *vs.* Bailey, Cowper 600.
Berkeley *vs.* York, 6 East., 105.
Gibson *vs.* Minet, 1 H. Bla., 614, 620.
Johnson *vs.* Clark, 7 John., 223.
Worthington *vs.* Hyler, 4 Mass. R., 196.

When a contract admits of two significations, that should be adopted which renders it operative rather than that which renders it void; so, if susceptible of two constructions, the one making it unlawful and the other making it lawful, the latter construction is to be adopted.

Cruise's title, 38 Devise, Ch. 19, § 18.
Archibald *vs.* Thomas, 3 Cow., 284.

It is not needful to invoke all the foregoing rules—no requisition on subtlety or ingenuity is required.

Part of the description is unequivocal, for the treaty itself is a part of it.

Now, what was the intention of the parties?

What was the object of the instrument? This is to be gathered from the circumstances of the case, although the instrument may be drawn into an unartificial and untechnical manner, for however just in general,

the maxim *quoties in verbis, nulla est ambiguitas, ibi nulla expositio contra verba, expressa fienda est*, yet it shall not prevail to defeat the intent and object of the parties, where it is clearly discernible on the face of the instrument, and the ignorance or mistake or blunder of the parties has prevented them from expressing it in appropriate language.

Jeremy on Eq. Juris., B. 3, Pt. 2, Ch. 2, p. 367.
Smith *vs.* Parkhurst, 3 Atk., 136.
1 Fonb. Eq. B., 1, chap. 6, § 11, 13 and notes.
Alexander *vs.* Newton, 2 Gratt., 266.
Smith *vs.* Jordan, 13 Minn., 264.

Here are the circumstances:

A treaty was made September 30, 1854, by which a section of land was reserved for Buffalo Chief, for which patents were to be issued to Buffalo's appointees.

Buffalo made a selection, but subject to future survey and location. He appointed Armstrong as the party to receive the patent.

Now, Prentice wants to buy an undivided half interest; he pays Armstrong $8,000, and receives a deed for the same, certain metes and bounds, embracing the location Buffalo made, are also included in the deed.

Now, there had been no survey; by the treaty there could be *no* absolute location; it was essentially a conditional one; the right to a patent was absolute, the location and patent were in future, but part of the same transaction. What was within the bounds was to the plaintiff, a matter of mere conjecture, so he refers to the treaty, and it becomes a part of the deed; it is just as though the following clause, was added to the description; the foregoing metes and bounds, however, subject to change by survey or by order of the President, so the description under the conditions and surroundings in 1856, the date of the deed, could not be more specific.

In view of this statement, how can there be any question as to intention?

To deny plaintiff's contention is to make the grant a nullity, to say that he shall receive nothing for his $8,000; to hold that no trust or equity in plaintiff's favor arose, by reason of the payment.

Consider the other circumstances, but one treaty, but one section of land reserved by Buffalo; the same section disposed of by Buffalo to Armstrong; but one section patented to Armstrong, and that patent a valid execution of the treaty.

Therefore if metes and bounds in the deed do not correspond with those in the patent, although this does not appear, it would signify nothing.

Falso demonstratio non nocet—mere false description does not make an instrument inoperative.

6 Term R., 676.

Because the words, exclusive of the false demonstration, are sufficient of themselves to describe the property intended to be conveyed, reference being had to the situation of the premises, to the name by which they had been known or to other circumstances.

15 Q. B. 241 (E. C., L. R. 69).

Reference is also made to this proposition:

"If I release all my lands in Dale, which I have by descent, on the part of my father, and I have lands in Dale on the part my mother, but no lands by descent on the part of my father, the release is void, and so the words of certainty, added to the general words, have effect; but if the release had been of Whiteacre in Dale, which I have by descent on the

part of my father, and it *was not so*, the release would be valid, for the thing was certainly enough expressed by the first words, and the last words were superfluous and of no effect.

Plowden, 191.
Nightengale *vs.* Smith, 1 Exch., 886.
Morrell *vs.* Fisher, 4 Exch., 599.
Doe *vs.* Hubbard, 15 Q. B., 227 (E. C. L. R. 69.)
Compton *vs.* Compton, 160 Q. B. 181 (E. C. L. R. 71.)

That is to say if the thing released or devised has substance and certainty enough, the untrue description is of no avail.

1 Exch. 887.

If there are certain particulars, which designate the thing intended to be granted, the addition of a circumstance false or mistaken, will not frustrate the grant.

Blayne *vs.* Gold, Cro. Cas., 447, 473.

Utile per inutile non vitiatur. Surplusage does not vitiate, that which in other respects, is good; when words placed in a deed make it repugnant and senseless, they are to be rejected equally with words of no signification.

Vaugh R., 176.
Whittemore *vs.* Lamb, 12 M. & W., 813.

"That is sufficiently certain, which can be made certain."

Co. Littleton, Ca.
4 Cruise's Dig., 4th Ed., 269, holding.

So a grant shall be void if it be totally uncertain, but if the King's grant refers to another thing, which is certain, it is sufficient.

How strangely applicable, the foregoing maxims and principles to the plaintiff's cause of action. Metes and bounds, necessarily, under the circumstances, conditional: subject to change, for which the treaty referred to in the deed, provides; meaningless or repugnant, perhaps, yet the description referring to what is positively certain:

a. The treaty.
b. The reservation to Buffalo.
c. The designation of Armstrong as appointee.
d. The Government records on file.

While it may be superfluous to cite other authorities, the fact that by some misconception the Circuit Court fell into error, on this question of description, and this question alone, the counsel feel justified in still further reviewing the policy of the Courts in construing deeds.

When lands described in one parish are in fact located in another, the grant is not defeated.

Rex *vs.* Wickham, 2 Ad. & El., 517.

So where a house, or a mill, or a factory, is conveyed *eo nomine*, it can be shown by extrinsic facts, what was part and parcel thereof, and so passed by the deed.

Greanleaf's Ev., Vol. 1.
Ropps *vs.* Barker, 4 Pick., 239.
Farrar *vs.* Stackpole, 6 Greanl,, 154.

How applicable to this case—the land set off by the treaty, proved definitely by the records, by the patent, by all the transactions relating to survey, location of boundaries, &c.

the maxim *quoties in verbis, nulla est ambiguitas, ibi nulla expositio contra verba, expressa fienda est*, yet it shall not prevail to defeat the intent and object of the parties, where it is clearly discernible on the face of the instrument, and the ignorance or mistake or blunder of the parties has prevented them from expressing it in appropriate language.

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How applicable to this case—the land set off by the treaty, proved definitely by the records, by the patent, by all the transactions relating to survey, location of boundaries, &c.

We call attention also to well known cases in this Court, which maintain, if a deed call for land lying in the County of C, and it turns out that the land lie in another county, that part of the description may be rejected and the rest take effect.

Boardman *v.* Reed, 6 Peters, 344.
Barclay *v.* Howell, 6 Peters, 511.
Stringer *v.* Young, 3 Peters, 320, 344.

Same rule applied, where premises are described by a number. It appearing that the grantor, owned no lot by that number, but owned another; held, that the number should be rejected, and effect given to the residue of the description.

Jackson *v.* Loomis, 18 John., 81.
19 John., 449.
Lush *v.* Drews, 4 Wend., 313.
Jackson *v.* Marsh, 6 Cow., 281.
1 Greanleaf Ed., § 285, 288.

Or, where the description begins at a certain corner, which the grantor did not own—in other words, the addition of a falsity or error, in a description is never allowed to hurt. When upon rejecting it, sufficient particulars remain to designate with certainty the object, intended to be conveyed.

Burr *v.* Broadway Ins. Co., 16 N, Y., 267.
Johnson *v.* Clark, 7 John., 223.
Worthington *v.* Hyler, 4 Tyng, Mass. R., 196.
Doe *v.* Vernon, 5 East R., 51.
Gascoigne *v.* Barker, 3 Atk. R., 9.
Dyer, 50.

In 5 East., 51, numerous cases are discussed and commented upon.

Bell *vs.* Sawyer, 32 N. H., 72.
Ownley *vs.* Jones, 73 N. Y., 621.
Colter *vs.* Marne, 18 Minn., 96.
Brown *vs.* Galloway, 98 Ill., 41.
Austriac *vs.* Davidson, 21 Minn., 117.
Myers *vs.* Ladd, 26 Ill., 415.
Peck *vs.* Mallams, 6 Seld., N. Y., 532.

The metes and bounds in the deed were perforce subordinate to the rest of the description, because at that time, the definite thing that Armstrong owned, was the right to a patent, for the land reserved or set off by the treaty. His interest, in the treaty, was the subject of the conveyance.

That which is certain and material, in a deed must control.

Jackson *vs.* Camp, 1 Cow., 605.
Doe *vs.* Thompson, 5 Cow., 371.
Jackson *vs.* Frost, 5 Cow., 346.
Jackson *vs.* Ives, 9 Cow., 661.
Jackson *vs.* Widgean, 7 Cow., 723.
Quincy *vs.* Blake, 37 Cal., 465.

In Ousby *vs.* Jones, 73 N. Y., 621, the description was entirely inadequate, but these words were added, "being the east-half part of the farm, whereon Johnson Babcock, now deceased, formerly lived," held, "the closing clause in the description in a deed, sums up the intention of the parties, as to the particular premises conveyed and has a controlling effect upon all the prior phrases used in the description.

This applied to the deed to the plaintiff would be decisive. Same rule in Clark *vs.* Scammon, 62 Me., 47.

In Dygerts *vs.* Pletts, 25 Wendell, 402, a sheriff's deed conveyed all the right, title and interest of the defendant, to a lot of land described as lying on the south side of a creek, in a town and county, given in the deed, a boundary could not be identified, held not void for uncertainty, because on the trial, from a map exhibited, and the fact that the defendant only owned one lot, Chief Judge Nelson, afterward an honored member of this Court, reversed the judgment below, and held the deed good, on the ground that the intention of the parties was ascertained. He cited, in his opinion,

Jackson *vs.* Marsh, 6 Cowen, 281,

where it is laid down, that if certain particulars are sufficiently ascertained in the description, in a patent or deed, which designate the thing intended to be granted, the addition of circumstances, false or mistaken, will not frustrate the grant.

These cases are further sustained by

Owen *vs.* Thomas, 3 My. & K., 353.
Cooper *vs.* Bigley, 13 Mich., 463.
Abbott *vs.* Abbott, 53 Me., 356.
Stevens *vs.* Johnson, 55 N. H., 405.
Haley *vs.* Ames, 44 Cal., 132.
Johnson *vs.* Robinson, 20 Minn., 189.
Raymond *vs.* Coffey, 5 Oregon, 132.
Reed *vs.* Spicer, 27 Cal., 59.
Hunter *vs.* Morse, 49 Texas, 219.
Woodward *vs.* Mins., 130 Mass., 70.
Showalter *vs.* Prince, 55 Mo., 218.

The metes and bounds in the deed to plaintiff was an attempt to locate the selection. He intended to convey his right under the treaty, he mistakingly supposed the particular land attached thereto, whereas the particular location by the treaty itself, was subject to change—if as the Court finds below [see Transcript of Record, p. 15, 5th finding of fact], a large portion of the land embraced within the courses and distances of said deed is covered by water; and part of Lake Superior; then the conclusion is irresistible that these metes and bounds are mistaken, and do not indicate, the intention of the parties. Now in view of the fact, that the subject matter, appears with reasonable certainty, from the deed, the rules of law required, as hereinbefore discussed, that effect be given to the deed, to carry into effect, the intention of the parties.

Anderson *vs.* Baughmans, 7 Mich.; 69.
White *vs.* Lunig, 93 U. S., 514, 524.
Sauyce *vs.* Kenkall, 10 Cushing, 341.
Peaslee *vs.* Gee, 19 N. H., 273.
Johnson *vs.* Simpson, 36 N. H., 91.
Clark *vs.* Scammon, 62 Maine, 47.
1 Iredell, N. C., 285.

This result then, is inevitable; the metes and bounds represented, a location subject to change, and were at best conjectural; the residue of the description indicates with absolute certainty, the "corpus" of the estate intended to be conveyed. And the deed was therefore effectual as a con-

veyance of any lands, patented, to Armstrong by virtue of the treaty.

V.

Should the plaintiff have occasion, he can urge, as a ground of recovery, in addition to the doctrine of relation; the certainty of the grant itself; and the rule of construction, by which the existence of what is false in a deed, will not frustrate the grant if enough remains to indicate the estate intended to be conveyed; the additional canon of construction.

"That every exception and uncertainty in a deed is to be taken favorably to the grantee; a deed is to be construed most strongly against the grantor, and, if it can inure in different ways, he may take it in such a way as shall be most to his advantage.

Jackson *vs.* Blodgett, 16 John, 172.
4 Cruie's Digest, Tit. 32, 23.
Shephard's Touchstone, 82, 83.

As, Lord Mansfield declared, these principles are landmarks, on which real property, essentially depends.

We make reference also to
Co. Litt., 183 a.
9 East., 15.
3 John, 387.

Construe, the plaintiff's deed according, to these rigid laws, and its meaning becomes too plain for argument.

We urge, therefore,

That if any ambiguity exists or doubt abides in the mind of the Court, the plaintiff is entitled to recover.

VI.

If the deed were not effectual to convey the patented land, by reason of a mistaken description, equity would relieve the plaintiff by reforming the deed.

In view of the circumstances of the case—
Gilman deed being a quit claim,
and Prentice's deed giving constructive notice of its contents, the defendant is not a *bona fide* purchaser without notice, and any relief obtainable against Armstrong can be had against Stearns, the defendant.

A Court of Equity will reform a bond and mortgage so as to make it conform to, a prior oral contract, where a mistake on plaintiff's part is established, though no fraud or mistake on defendant's part, is proved.
Rider *vs.* Powell, 28 N. Y., 311.

Courts will reform, where there is a mutual mistake.
Bartlett *vs.* Judd, 21 N. Y., 199.
Jackson *vs.* Andrews, 59 N. Y., 245.

They will even reform a deed, when the import of the words is misunderstood.

Bush *vs.* Hicks, 60 N. Y., 306.
Hopping *vs.* Struble, 60 N. Y., 430.
Buffalo R. R. *vs.* Styles, 61 N. Y., 348.
Brown *vs.* Broadway Ins. Co., 16 N. Y., 273.
Huss *vs.* Morris, 63 Penn St., 367.
Van Duyne *vs.* Van Duyne, 23 Mich., 321.
Hartford W. Co. *vs.* Miller, 41 Conn., 112.

The foregoing decisions demonstrate, the eagerness and extent to which equity reaches out its helpful hand to correct mistakes which otherwise, especially in cases like this, would work irreparable damage, and permit fraud, to entrench itself behind the, sanction of the law.

CONCLUSION.

The plaintiff, in error without, recapitulating the several ground shereinbefore set forth, respectfully submits, that upon either, the judgment and decision, appealed, from should be reversed with costs.

The plaintiff in error, reserves the right to present an additional argument as a rejoinder to the argument which will be submitted by the defendant in error.

BENJAMIN A. WILLIS,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 1157.

FREDERICK PRENTICE, Plaintiff in Error,

vs.

ORZORA P. STEARNS, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Minnesota.

Reply of Plaintiff in Error to Argument of Counsel for Defendant in Error.

BENJAMIN A. WILLIS,
Counsel for Plaintiff in Error.
2 Wall Street, New York City.

Supreme Court of the United States.

FREDERICK PRENTICE,
Plaintiff in Error,

vs.

ORZORA P. STEARNS,
Defendant in Error.

PLAINTIFF'S REPLY TO ARGUMENT OF DEFENDANT IN ERROR.

Sydney Smith once remarked, in his apt language, "It is a great point in any question to clear away incumbrances, and to make a naked circle about the object in dispute, so there may be a clear view of it on every side." Responding to this hint, let it be prefaced that the following distinctive propositions, presented in the brief of defendant's counsel, were rejected by the court below:

1. That there was no reservation out of the lands ceded by the treaty of September 30th, 1854.

2. That Buffalo was clothed with a naked power to select a section of land and appoint donees to take it.

3. That he could not transmit the power; not having exercised it while living, it died with him.

4. That Armstrong and the other patentees, were donees of the Government by its voluntary action, and not under treaty stipulation.

5. That no legal or equitable interest in Armstrong and the other relations of Buffalo vested, until the issuance of the patents in 1858.

6. That the patentees were donees, without consideration—the lands constituted a gift; and there could be no gift without delivery.

7. That the Government, in selecting the land, disregarded the provisions of the treaty; that the whole proceeding, was foreign to the treaty and unauthorized by law.

8. That no land was set off, to the Indian chief, Buffalo; that the Chief Buffalo, had not disposed of any land to Armstrong, and there was no record thereof in the Government departments, as recited in plaintiff's deed.

All of the foregoing positions were distinctly overthrown by the Court, as will appear by reference to the Transcript of Record (pages 14, 15, 16, and 17). Yet the defendant still thinks it needful, in order to sustain his theory, that they should be accepted by this Court.

Why then discuss questions, no longer in controversy, beyond the domain of discussion?

"The only contention of the defendant recognized as well founded by the Court below is this: That the metes and bounds, the courses and distances, in the deed, from Armstrong to Prentice contain all the land affected by the deed, and such land is not that, involved in this action."

To this one point then we will confine the argument, not reiterating or needlessly amplifying what already appears in plaintiff's brief.

At the outset, the counsel for defendant, takes umbrage that the plaintiff urges certain equities claiming that, forasmuch as this is an action of ejectment, they have no relevancy in this proceeding, he is seriously disturbed, by the statement in our brief, that the plaintiff paid $8,000 for an undivided half of a section of land, one mile square, insisting there is no proof, as to amount paid, and at the same time pretending that the consideration is a matter of no moment. It is sufficient to say that the deed to Prentice is, conclusive on this point. Are these equities of no force then? Is this view of the controversy correct?

All the cases cited in plaintiff's brief—

Crews *vs.* Burcham,
Doe *vs.* Wilson,
Landes *vs.* Brant,

were actions, of ejectment. The record title, in each was in the defendant, and it was only by virtue of the incipient, inchoate, equitable title, that the plaintiffs recovered.

In this action we establish beyond peradventure, the intent of the parties to the deed; the fiduciary relation Armstrong sustains to this plaintiff, and the extent to which, the court lends its aid, in defeating, injustice, as the following decisions demonstrate:

Lodge *vs.* Lee, 6 Cranch, 237, and
Jackson *vs.* Root, 18 John., 59;

where deeds, containing descriptions, far more indefinite and uncertain than that, in dispute in this action, were given effect, and false calls rejected as surplusage, and—

May *vs.* Leclaire, 11 Wal., 217,

in which your lamented associate, Justice Swayne, in pronouncing judgment, declared that where a trustee has abused his trust, in the same manner, the *cestui que trust*, has the option, to take the original or the substituted property. Citing with approbation—

Taylor *vs.* Stena, 3 Maul. & S., 562,

which contains this ringing declaration: "Where converted property has assumed altered forms, by successive investments, the owner may follow it, as far as he can trace it, and sue at law for the substituted property."

Armstrong, with $8,000 in his pocket, could do nothing affecting the selection for his own benefit, for he had a duty to perform inconsistent with such action.

Torrey *vs.* Bank of Orleans, 9 Paige, 650.
Willard's Eq. Juris., p. 605.

The Court will follow the estate into the hands of the party in whom, it becomes vested, and will treat him, as a trustee for the execution of the trust.

1 Mad. Ch. Pr., 580.
5 Beav., 222.
Hill on Trustees, p. 58, p. 75.

And yet the counsel for defendant, because he has wintered and summered, in Minnesota, wonders how these doctrines can avail the plaintiff, and insists, that the doctrine of relation, does not apply.

The plaintiff insists, that it does; that it is readily comprehensible in view of the undoubted principle:

"*That the doctrine of estoppel comes to the rescue of the plaintiff, and enables him, in a legal action, to reap the full* advantage of all his equities; it *transforms them into a legal right, enforceable in a legal action.*"

This doctrine operates actually to transfer the after-acquired title by *operation* of *law;* it adheres to the estate; is transmitted with the estate; becomes a muniment of title, and all, who afterward acquire the title, take it subject to the burden, which the existence of the fact, imposes upon it.

Douglas *vs.* Scott, 5 Ohio, 198.
Bank *vs.* Musician, 3 Barb. Ch., 567.
Rawle on Covenants for Title, p. 427.

The counsel for the defendant admits the force of this reasoning, but contends that (see p. 5, def't's argument) "estoppel arises only

by virtue of, covenants, and in the deeds to plaintiff, there are no covenants," and therefore, it is of no advantage to him.

Let this proposition be answered by the late Associate Justice Nelson in—

Van Rennselaer *vs.* Kearney, 11 How., 322.

Here are his words, and they contain, a masterly exposition of the principle:

"If the deed bears on its face evidence of the intention on the part of the grantor to convey, and that the grantee intended to become invested with an estate of a particular description or quality, or the bargain had proceeded, upon that footing, between the parties, then although it may *contain no covenants* of title, still the legal operation and effect of the instrument will be as binding upon the grantor, and those claiming under him in respect to the estate thus described, *as though a formal covenant*, to that effect, had been inserted at least, so far as to estop them from ever after denying that he was seised, of the particular estate, at the time of his conveyance."

To add anything to this opinion "would be carrying coals to New Castle."

Remember, too, the Circuit Court found that the Prentice deed gave constructive notice of its contents to the world. That the Gilman deed conveyed what Armstrong owned *and no more*. So that Gilman was not a purchaser without notice for full value, but a *mala fide* purchaser, for a nominal consideration of $500, which in itself indicates that Armstrong supposed he had no interest to sell, and that Gilman thought he was buying a technical claim, for which he could afford to pay a trifling sum. Furthermore, that Armstrong sold only one-half to Cash and Kelly (see findings of fact), which creates a presumption that he, "Armstrong," supposed he had already sold the other half to this plaintiff.

The inevitable sequence of these facts, growing out of these propositions, is that the patent, when issued, inured for the benefit of the plaintiff—related back to the date of the treaty, and that its recitals are conclusive—that the property described in it, was reserved by the treaty of September 30, 1854.

The attention of the Court is requested, to the following citation from defendant's argument on page 6:

"If nothing had been done by the beneficiary toward the selection and identification of the land, but he had conveyed 'the section reserved by the treaty,' and his meaning had been clear to transfer the interest, secured to him by the treaty, the cases of Doe *vs.* Wilson and Crews *vs.* Burcham would have been in point; supposing that Buffalo had been a beneficiary, under the treaty, which we shall hereafter see he was not, but the donee of a mere naked power."

Does not this statement involve an absurdity?

Did Buffalo lose any rights because he did, what the treaty authorized him to do—make a selection, subject to future survey, boundaries to be thereafter defined?

Yet the defendant's counsel so claims.

Did not Armstrong, when he conveyed the land set off to Buffalo, convey the land reserved by the treaty? Are not these phrases precisely alike, in import? Most certainly.

But the counsel insists, that he was the donee of a mere naked power.

Is this so?

Does not the treaty itself show, that the reservation was in consideration of a cession of lands? Does not the patent recite the consideration? Does not the court below find that the appointment of Armstrong, to receive a patent on the 30th of September, 1854, was valid, and vested in him such an interest, as the treaty gave? (See 1st Conclusion of Law, Transcript of Record, page 16.)

Then all the ifs, are eliminated, and we have the admission of the defendant's counsel that the cases of Crews *vs.* Burcham and Doe *vs.* Wilson apply.

The appointment and reservation, became valid, when the treaty was ratified. The patent was a valid execution of the treaty.

To defeat the plaintiff's cause of action, it is necessary to make the Government capable of infinite folly.

1. The selection, being subject to future survey, and also to change of location, in the event of a portion selected, being occupied by settlers, is made pursuant to the treaty, reserved by the treaty legally, and is conveyed.

2. The Government for certain reasons, concludes, to patent another section, contrary to the terms of the treaty.

We have two sections—

One reserved by a treaty, which is the supreme law—

Another, by a patent to a donee without consideration, which patent is *also* a valid execution of the treaty.

Shall the two stand together, or will the Court reconcile them and give force to the unquestioned intent, of the parties? It must, at least, reject the argument of defendant's counsel.

The defendant's counsel, in his argument, page 12, says:

"The only instrument recorded in the Government documents (this is a call in plaintiff's deed) is still, the selection of Buffalo, which, again, does not embrace the lands in controversy."

This is contradicted by the findings of fact, by the court below.

(See Transcript of Record, 9th finding, page 15, and Exhibit D, a part of the finding, page 24.)

And the following language will be found, which should be deemed conclusive:

"When the position of the land selected, was definitely ascertained, it was found that a portion of it had been settled upon, and was occupied and claimed by George E. Nettleton, an Indian trader, under the second above-recited clause of the treaty, which secured pre-emption rights in certain cases, and that another portion was claimed by a brother of said Nettleton, as was understood in the same provision."

The relatives of the chief "authorized the agent, Gilbert, to select a body of land, as near as could be, one square mile, contiguous to the Nettletons' claim; thereby releasing all claim, to the two quarter-sections in dispute."

This selection, was acquiesced in by the Secretary of the Interior, approved by the President, and a patent, embracing the modified selection, issued. So the patent contained two quarter-sections of the original selection, and two quarter-sections contiguous thereto in lieu of those claimed by the Nettletons.

This is a finding of fact, a part of the record which exuberant rhetoric cannot disturb.

The patent then embraced at least one-half of the original section, although under the authority of—

Doe *vs.* Wilson, and
Crews *vs.* Burcham,

plaintiff protests, that the recitals in the patent are conclusive.

"On page 13 of his argument, the defendant's counsel, refers to the language in the treaty, "the exact boundaries of which may be defined when the surveys are made," intimating that this strengthens his position; that the slight changes, possible, indicate his intent. This is strange reasoning and inconclusive, for it ignores the modifications already referred to, made pursuant to other sections of the treaty, and explained in the exhibit, which is part of the 9th finding of fact.

The defendant's counsel, in his argument on page 14, point 2, says, "that parol evidence may be received of surrounding circumstances; that aid, the court below is presumed to have, had. The plaintiff in error has the *onus* of showing error in the record."

The precise purpose of this statement is not apparent. Is it a technical device to make conclusive the findings of fact?

It cannot avail.

There is no controversy as to what testimony was adduced. We do not assail the record, for it is complete. What we repel is the mistaken and, as we believe, unwarranted inferences—the legal effect, given to the testimony.

As to Armstrong's interest, is not his confirmatory deed as effica-

cious as any parol testimony could, prove? (It is in the Transcript of Record, Exhibit "G," page 26.)

As to the location, and modification, and substitution, and the extent of change, are not these embraced in the findings of fact? And if the findings, at any point, clash or are inconsistent, it is the province of this appellate Court, to reconcile and amend them.

The counsel for defendant, on pages 15, 16, and 17, enters into a branch of the discussion which is already barred out by the adjudication of the Circuit Court, the substance of which, being contained in part 3 of his argument, is—

That "Armstrong was not a beneficiary of the treaty."

"That Buffalo could not convey or assign the bare right of selection under the treaty. That Buffalo was not an actual beneficiary under the treaty, but merely the donee of a naked and collateral power; that such power was not assignable."

"That Armstrong did not assign any interest in the treaty, because he could not have taken and held such interest himself. That the deed has no apt words to convey interest in the treaty, but the language is confined to the actual selection of Buffalo."

Every contention has been frowned upon by the Court.

The conclusions of law are to this effect—

That the appointment and selection were both valid.

The selection was to be made subject to conditions specified in the treaty, surveys, and pre-emption rights. No other selection was ever made, but modification and adjustment were had according to precise terms of the treaty, which modification and adjustment could not lawfully or equitably affect the rights of any parties, either the appointees or their assigns. When Armstrong acquiesced in the change of boundaries, in the substitution of two quarter-sections for two others, he acted for this plaintiff as his trustee. The selection was legal when made, it was legal when plaintiff received his deed, it was always conditional within scope of the treaty; and if there is anything peculiar about the selection, it is not the fault of the plaintiff, or of Buffalo, or of Armstrong, but of the treaty, which, being the supreme law of the land, must be respected.

The Government received consideration from Buffalo, a cession of lands. Buffalo received consideration from Armstrong, valuable services, which are recited in the treaty. Armstrong received valuable consideration from the plaintiff, eight thousand dollars.

The Government undertook to pay to these appointees the debt

due them from their chief, a party to the treaty. It executed the treaty. The patent was the valid execution thereof. So much, then, has been vainly urged by defendant's counsel, that no land was set off; that Buffalo disposed of none to Armstrong; that Buffalo was not beneficiary, but a donee of a mere naked favor; but it appears quite idle to pursue the subject further.

This Brief, in reply to defendant's argument, is submitted pursuant to a stipulation between the parties.

BENJAMIN A. WILLIS,
Counsel for Plaintiff in Error.

113-435

Supreme Court of the United States.

FREDERICK PRENTICE,
Plaintiff in Error.

vs.

ORZORA P. STEARNS,
Defendant in Error.

Argument for Defendant in Error.

GORDON E. COLE,
Attorney for Defendant in Error.

ST. PAUL:
H. M. SMYTH PRINTING CO.
1884.

United States Supreme Court.

FREDERICK PRENTICE, Plaintiff in Error,

vs.

ORZORA P. STEARNS, Defendant in Error.

ARGUMENT FOR DEFENDANT IN ERROR.

I.

The plaintiff in error, after starting out by the announcement that he proposes to confine the controversy before this Court to the utmost, seems to have exhausted himself in his efforts to confine the *controversy*, and does not permit *himself* to be confined either to the issues or the record. He discourses at length of what a court of equity would do to relieve parties. As this is an action of ejectment, and the judge who tried the case was considering the purely legal relations of the parties, it would be unfair to him as well as a violation of well established

rules governing the Federal courts, to discuss or consider, much less to place the determination of this case upon equitable grounds, and I shall not therefore discuss them.

Whether there was a mistake of fact in the execution of the Prentice deed, so that it did not express the real intention of the parties, is a question upon which there is in the record and could be, in this form of action no evidence whatever, and it will be time enough to consider it whenever it shall properly arise.

The counsellor in his discussion of the facts in the case pays little regard to the record, and I am at a loss to conjecture upon what source he drew for his assertions of fact.

For instance, he repeats very often, as if he expected some such benefit from it as if he were appealing to the prejudices of a jury, that his client paid eight thousand dollars for this land. There isn't a particle of evidence that he paid a cent for it. The consideration is stated in the deed at eight thousand dollars.

As his right to recover in his action of ejectment depended purely upon the construction of the descriptive clause in his deed, his right to recover would have been equally perfect if he had paid a dollar for the land; the amount of the consideration not being at issue we could not be permitted to show the real consideration, hence no inference can be drawn from the nominal consideration stated in the deed.

I don't know how it may strike a New York lawyer,

but to us who have summered and wintered in Minnesota from the Territorial days, and I presume to this court, which will take judicial notice of the history of the country so far as it is a matter of general history, the idea that a real estate speculator should, in 1856, long years before Proctor Knott discovered Duluth, and when the north shore of Lake Superior was a howling wilderness, Nettleton's trading post the only sign of civilization and the rocky soil utterly valueless for all purposes of agriculture, have bought one-half of a section of a half-breed and paid him eight thousand dollars for it, is a little amusing.

But a more amusing feature of the counsellor's argument on what he calls the facts, is that this same land as he claims it is, which in 1856 was worth eight thousand dollars, had in 1864, when the city of Duluth had grown into a prosperous town, depreciated with the advancing growth of the State to a value of five hundred dollars, which he says was what Gilman paid for it, deriving his knowledge in this case as in the other from the nominal consideration stated in the deed.

But in his efforts to disparage our equities and magnify those of his client, although the consideration of neither is material or relevant in this action of ejectment, he proceeds to make the astonishing assertion that Mr. Gilman purchased for other parties and after holding it for a short time turned it over to them, and there is no proof that they did not have

actual notice of the plaintiff's conveyance. Where he got this must remain a matter of conjecture; it certainly isn't in the record. All that there is in the record on the subject of Mr. Gilman's purchase is the finding of Judges Miller and Nelson, that Armstrong conveyed to him for a valuable consideration, and that he (Gilman) took his conveyance without any actual notice of said deed from Armstrong to the plaintiff, or that plaintiff claimed any interest in the land so conveyed to him, said Gilman.

Folio 22, Record.

The counsellor also assumes to discuss questions of fact, as though the findings of fact could in the absence of the evidence be reviewed by this court. Of course he is concluded by the finding that the land conveyed to Prentice is not the same land as that conveyed to Gilman. In other words, that the land of which plaintiff's proof showed title in him in an action of ejectment was not the same land as that of which defendant was in possession and to which he claimed title. Of course this is an end of the case, unless this court can see by an inspection of plaintiff's deed that the court below has erred in the construction of the descriptive clause. So far as the case depends upon the application of metes and bounds, courses and distances to the ground, which is always assisted by parol evidence, the findings are conclusive that the Prentice deed did not in its specific description describe the land in controversy.

5th Finding, folio 19, Record.

So that the controversy is narrowed down to the question whether the further clause in the Prentice deed, to-wit, "being the land set off to the Indian chief Buffalo at the Indian treaty of September 30th, 1854, and which was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded in the government documents," ekes out a description of the land in controversy.

The counsellor has very learnedly discussed the doctrine of relation, but in its discussion he begs the whole question. It is hardly worth while to suggest that A relates back if at all to A, and B to B, but not A to B, or B to A. A subsequent deed or patent can hardly relate back to and make valid a deed of an entirely different tract of land.

So the contention of the plaintiff in error so far as it is based on an estoppel finds no place here, as estopel arises by virtue of the covenants, and in the deed to plaintiff there are no covenants.

Folio 28, Record.

The cases which the counsellor relies upon as analagous are not analagous upon the only point in this case.

Doe v. Wilson, 23 How. 457, and *Crews v. Burcham, 1 Black. 352*, both arose under the same treaty. The beneficiary had in each case undertaken to convey by deed with full covenants the *exact interest* which the treaty gave him, there having been no intermediate act and no attempt at selecting any particular land, or of

identification, and when the patent subsequently issued it was held to take effect by relation.

Landes v. Brandt, 10 *How.* 372, was also the case of a deed of the specific land to which the patentee was entitled, and when the patent of that identical land issued it was held to be the mere evidence of a title which had vested many years before by confirmation of the claim and to relate back to its inception.

These cases can afford no aid in construing the grant to the plaintiff, which is the real question in this case.

The treaty with the Chippewas made on the 30th day of September, 1854, contained a provision whereby it was agreed "that chief Buffalo may select one section of land at such place in the ceded territory as he may see fit, which shall be reserved for that purpose and conveyed by the United States to such person or persons as he may direct."

Now it will be seen that no land was "set off" by that treaty, but a floating right to select a section of land; the selection by the beneficiary and approval of the president would "set off" the land, that is identify the precise section and segregate it from the public mass.

If nothing had been done by the beneficiary towards the selection and indentification of the land, but he had conveyed "the section reserved by the treaty," and his meaning had been clear to transfer the interest secured to him by the treaty, the cases of *Doe v. Wilson*, and *Crews v. Burcham*, would have been in point:

supposing that Buffalo had been a beneficiary under the treaty which we shall hereafter see that he was not but the donee of a mere naked power.

But his title did not rest there. On the very day of the date of the treaty and contemporaneous with it, he attempted to have the identical section set off and segregated from the public mass, by a formal selection in writing, duly executed and filed in the office of the United States Commissioner of Indian Affairs at Washington, D. C.

3rd Finding, folio 18.

In regard to this selection, the court, by a finding which is conclusive here, finds "that the land Buffalo had in view and intended in such designation is not included, nor any part thereof, in the patents subsequently issued by the United States, under which defendant claims and which describe the land in controversy;" (*see end of 3rd finding, folio 18.*) So that the patents when issued could not have relation to that land because it is not embraced in the land patented, but is an entirely different tract.

Now the question presented here is, in this action of ejectment does the plaintiff's deed convey whatever interest Buffalo took under the treaty or the specific land thus attempted to be selected and set off by him and which is not the land in controversy?

The conveyance under which plaintiff holds, and which must describe and convey the land subse-

quently patented or the plaintiff must fail to recover it in ejectment, is so far as material as follows:

"*Have released, demised and quit-claimed, and do by these presents release, demise and quit-claim, unto the party of the second part and to his heirs and assigns forever, one undivided half of all the following described piece or parcel of land situate in the County of St. Louis and Territory of Minnesota, and known and described as follows, to-wit: Beginning at a large stone or rock at the head of St. Louis River Bay nearly adjoining Minnesota Point, commencing at said rock and running east one mile, north one mile, west one mile, south one mile, to the place of beginning; and being the land set off to the Indian chief Buffalo at the Indian treaty of September 30th, 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion or reversions, remainder or remainders, rents, issues and profits thereof. To have and to hold the aforesaid premises, with all the privileges and appurtenances to the said premises belonging or appertaining, unto the said party of the second part, his heirs and assigns forever; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or* TO THE ABOVE DESCRIBED

PREMISES *and every part and parcel thereof with the appurtenances.*"

It is to be noticed that here is no attempt to convey any equities arising under the treaty; whatever might have been done, this deed does not do it or attempt to do that or anything else but to specifically describe a certain tract of land, and all the usual and following phrases are carefully and strictly limited in their application to the "*above described premises.*"

The court finds by a finding which is also conclusive here, "that a large portion of the land included within the courses and distances of this deed is covered by water, and that portion which is not covered by water in said description is land which Chief Buffalo had in view and intended to embrace in his selection as aforesaid, but does not embrace the land involved in this suit."

See for the deed *folio 28, Record;*, for the finding, *5th finding, folio 19, Record.*

So far then as there is a specific description of land in the deed to the plaintiff, it is the land selected and set off at the treaty and recorded in the government documents at the instance of Chief Buffalo, and it is not the land in controversy or which was subsequently patented.

Now, without undertaking to compete with the counsellor in a display of real estate learning, I undertake to say that the land which Chief Buffalo had in view answers every call in the Prentice conveyance, and the

land subsequently patented answers none of them; and I care not which of the authorities which he cites he selects, or if he selects all of them and applies them to the facts of this case, the result will still be a failure to maintain his ejectment.

If he says the description by metes and bounds controls, the court has found conclusively that that does not include the lands in controversy. If on the other hand he claims that the reference to the selection by Buffalo controls the metes and bounds, the court has also found conclusively that that does not include the lands in controversy.

If on the other hand he claims that the second call refers to the lands reserved by the treaty and not to the selection by Buffalo, and that the last call controls a previous one, then I reply that even if he were right a still later call fastened beyond power of detatchment by any effort of legal sophistry the lands in the deed to the actual lands selected by Buffalo and vested by him in Armstrong.

Let us take the calls in detail: Call No. 1, the description by metes and bounds, not the land in dispute. Call No. 2 "being the land set off to the Indian Chief Buffalo at the treaty;" the only setting off was the formal selection by Buffalo, and that does not embrace the lands in dispute. Call No. 3 "was afterwards disposed of by said Buffalo to said Armstrong."

Literally the land was not directly disposed of by Buffalo to Armstrong, but it was mediately and through mesne conveyances. Buffalo designated four

persons in his selection to whom the land should be conveyed, the other three subsequently conveyed to Armstrong, which is the only conveyance answering this call.

This conveyance, after reciting the treaty, proceeds: "*And whereas, the said Chief Buffalo after the making and concluding of said treaty and on the 30th day of September, 1854, did by an instrument in writing duly executed by him select a tract of land one mile square, the exact boundaries of which may be defined when the surveys are made on the west side of St. Louis Bay, Minnesota Territory, immediately above and adjoining Minnesota Point, and did direct that patents be issued for the same according to the above recited provisions (of the treaty) to Armstrong, adopted son, to Mathew, nephew, and to Joseph and Antoine, sons of said nephew Mathew, one quarter section to each. Now therefore, we the said Mathew, Joseph and Antoine, in consideration of the premises and of one dollar to us paid by the said Benjamin G. Armstrong, the receipt whereof is hereby acknowledged, we do hereby sell, assign and transfer, jointly and severally, all our right, title, interest, claim and property in and to the said land, and all our right and equity in and to the said instrument so made by the said Buffalo, jointly and severally, and our and each of our right and equity to have patents issued to us according to the above recited directions of the said Buffalo; and we hereby direct, jointly and severally,*

that patents issue to said Benjamin G. Armstrong, accordingly."

Exhibit A, p. 17, Record.

It is to be noticed how carefully this conveyance avoids conveying any equity under the treaty, and confines the conveyance to the right and equity to have patents issued according to the above recited directions of said Buffalo, which are stated as follows: "did direct that patents be issued for the same," to-wit, the land just described; which is not the land in controversy. What they sell is the right and title to the said land described as in Buffalo's selection, and it is their rights under that instrument that they transfer to Armstrong. So that the call "afterwards disposed of to said Armstrong," coming after the call for the lands set off, if there could be any ambiguity about that, again refers us to the lands embraced in Buffalo's selection, which are not the lands in controversy, (call 45th,) "and is now recorded with the government documents."

The only instrument recorded in the government documents is still the selection of Buffalo, which again does not embrace the lands in controversy Then to these calls add the subsequent language of the deed, by which no equity or right under the treaty is alluded to, but in the strictest language of the conveyance the appurtenances, rents, issues, etc., reversions, remainders, etc., are all limited upon the legal estate in *the above described premises.*

Much stress is laid in the argument for the plaintiff in error upon the language in Buffalo's selection: "The exact boundaries of which may be defined when the surveys are made."

If this clause is of any significance, it only strengthens our argument. It would naturally happen in making any selection before the surveys that the lines might not exactly conform to the rectangular lines of the surveys, and this trifling correction would naturally be provided for as it is. But Buffalo *did* mean, and this language strengthens the conclusion, if strengthening were necessary, that the government section which should substantially overlap the land selected by him, should be the one patented to him, and that land subject to mere straightening of lines to conform to future surveys is what plaintiff by every call in his deed obtained. Buffalo certainly did not contemplate that his selection should be absolutely abandoned and another and different tract taken, otherwise his action in making any selection would be meaningless.

The counsellor for the plaintiff in error sums up his case in language which ought to be satisfactory to us. He says at the bottom of page 14 of his brief:

"So regarding the metes and bounds indefinite to indicate the property, we may exclude them from consideration and have a perfect description in these words: 'the land set off to the Indian chief Buffalo at the Indian treaty of September 30th, 1854, and was afterwards disposed of by said Buffalo to said Arm-

strong, and is now recorded with the government documents, with all the privileges and appurtenances.'"

Exactly, the privileges and appurtenances cannot enlarge the grant, but are themselves limited by it.

The land "set off" to the chief at the treaty was set off by his selection and is not the land in suit. The land disposed of to Armstrong is specifically described to be the land selected by Buffalo by an instrument in writing referred to, which instrument describes different lands from those in suit and is now recorded in the government documents. The selection recorded in the government documents was the land selected by Buffalo and not the land in suit.

Folio 18, Record.

II.

In ascertaining what land is embraced in the description of a deed, parol evidence may be received of surounding circumstances, so that the court may have the light of such circumstances, in construing the instrument; they are entitled to be placed in the situation of the parties and to resort to such circumstances in aid of its construction; this aid the court below is presumed to have had. The plaintiff in error has the onus of showing error in the record. In the absence therefore of a bill of exceptions showing the evidence, the findings of the court below are conclu-

sive. The court will not presume that the court below did not have the benefit of such evidence as was proper to aid them in arriving at a true construction of the deed, and none of the evidence in the case being returned his conclusions and findings cannot be reviewed.

III.

In conclusion, I desire to remind the court that Armstrong was not the beneficiary under the treaty, and whatever Buffalo might have conveyed, had he conveyed directly to the plaintiff, Armstrong can and could convey to the plaintiff only what Buffalo had transferred to him.

Buffalo, in his selection, directed that patents should issue for the specific lands included and described in it, which the court finds were not embraced in the lands in suit, and the other donees of Buffalo conveyed to Armstrong the specific land selected by Buffalo; so that the deed of Prentice is made to depend on the selection and subsequent conveyance through which Armstrong derives his title.

Armstrong did not convey any general right of selection under the treaty, for the language of his conveyance contains no apt words to pass it; he could not had he attempted it have conveyed any such right, for he had none.

Indeed Buffalo could not have conveyed or assigned the bare right of selection under the treaty; whatever, by reason of the conclusive effect of the recitals in the patents, may be the status of the holders of the lands actually patented; (perhaps no one can now controvert them and say that the final selection was not properly made;) in construing the language of the deed to the plaintiff in connection with Buffalo's actual selection and the vestiture of the title in Armstrong, we must remember (and it may aid us to consider) that Buffalo was not an actual beneficiary but merely the donee of a *naked and collateral power*.

The language of the treaty is: "And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that Chief Buffalo may select, etc., which shall be conveyed to such persons as he may direct."

In this important particular the case differs from *Doe v. Wilson*, and *Clews v. Buchanan*, *Landes v. Grant*, and similar cases.

The selection of the lands cannot be disassociated from the selection of the appointees; both are contained in the same clause and were to be made by the same person. In this case who so proper or suitable to decide the question who had rendered important services to his tribe as the chief; he alone knew the nature of the services performed for his people and by whom performed, and he was the natural and proper conduit through which the favor of the govern-

ment was to flow out to the benefactors of its wards. Such a power is not assignable.

1 Sugden on Powers, 222.
2 Washburn on Real Property, 662.

So that the situation may be thus summarized: Buffalo could not have assigned his right of selection which was his only right under the treaty. 2d, he did not attempt to do so, but having made a selection, directed a patent of the land so selected to be executed to Armstrong.

Armstrong did not assign any right under the treaty because, first, Buffalo could not have vested the power of appointment in him. Because, second, he did not attempt to do so, but undertook to vest the title in a specific tract in him not embraced in the lands in suit.

He did not assign any interest under the treaty to Prentice, 1st, because he could not have taken and held such interest himself. 2nd, because no apt words to convey any such interest occur in the conveyances to him. And 3d, because there are no apt words in his conveyance to Prentice to convey such an interest, but the language is explicitly confined to the actual selection of Buffalo.

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